Supreme Court, U.S.
FILED
JUL 18 2006
OFFICE OF THE CLERK

No. 06-06-94

In The
Supreme Court of the United States

FULLER-AUSTIN INSULATION COMPANY, f/b/o FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST,

Petitioner,

v.

HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, Pages 122 to 340

CHARLES J. COOPER*
MICHAEL W. KIRK
BRIAN S. KOUKOUTCHOS
DEREK L. SHAFFER
NICHOLAS A. OLDHAM
COOPER & KIRK, PLLC
555 Eleventh Street, N.W.,
Suite 750
Washington, DC 20004
(202) 220-9600
**Counsel of Record*

Counsel for Petitioner

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

ROBERT M. HORKOVICH
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1322

MICHAEL Y. HORTON
JASON B. KOMORSKY
MORGAN, LEWIS & BOCKIUS LLP
Twenty-Second Floor
300 South Grand Avenue
Los Angeles, CA 90071
(213) 612-2500

STEVEN A. BUXBAUM
HAYNES AND BOONE, LLP
One Houston Center
1221 McKinney Street, Suite 2100
Houston, TX 77010
(713) 547-2041

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 The Honorable Judith C. Chirlin Dept. 89 REVISED STATEMENT OF DECISION AS TO PHASE IA, ISSUES 1 AND 8 (Filed Jul. 31, 2003)

I. INTRODUCTION

Fuller-Austin Insulation Company brought this declaratory relief action to determine the obligations of its insurers, under various comprehensive general liability, umbrella and excess policies issued between 1944 and 1985, for claims against Fuller-Austin alleging bodily injury arising out of the exposure to asbestos-containing products installed or removed by Fuller-Austin.

This action originally included as defendants the solvent insurance companies which issued primary, umbrella and excess policies to either Fuller-Austin Insulation Company or Dynalectron (later known as DynCorp). During the course of this action, Fuller-Austin settled its insurance disputes with all the primary carriers it had sued and some of the umbrella carriers. Those parties were dismissed from this lawsuit once the U.S. District Court in Wilmington, Delaware, acting as the bankruptcy court overseeing the Fuller-Austin bankruptcy, approved each settlement. The remaining defendants are as follows: The American Insurance Company

(erroneously named as Fireman's Fund Insurance Company), Chicago Insurance Company, Columbia Casualty Company, Federal Insurance Company, First State Insurance Company, Highlands Insurance Company, The Home Insurance Company, International Insurance Company, London Market Insurers, New England Reinsurance Corporation, Stonewall Insurance Company, Twin City Insurance Company and Transcontinental Insurance Company.

A. Order Of Trial.

The Court ordered that Phase I of the trial consist of nine legal issues for the Court's determination. Trial of legal Issues #1-#9 was first recommended by Judge Frederick Lower, (see Exhibit K attached hereto), and adopted by the Court on December 1, 2000. Because these issues are either pure questions of law or are interpretations of insurance contracts, a jury is not warranted. *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865 (1965). The nine issues are:

1. The resolution of disputes, if any, relevant to the issues of Phase I concerning (a) the content of policies; (b) the policy periods; (c) the incorporation of lower level policy language into upper level policies, i.e. what language in lower level policies is relevant and what language is to be incorporated? Any issues of limits of liability are to be reserved for Phase II.

2. What is the legal effect of policy language that requires the underlying carrier to "have paid or have been held legally liable to pay the full amount of their respective limits of liability" before an excess carrier's obligation arises?

(a) Is actual payment in cash, in full, or at all, required before an excess carrier's obligations are triggered?

(b) Does payment of underlying limits to the insured rather than to third party claimants constitute exhaustion?

(c) Does installment payments of underlying limits to the insured constitute exhaustion?

(d) Does an underlying insurer's assertion of exhaustion, contested by the insured, constitute exhaustion?

(e) Does an insured's assertion that its underlying coverage has been exhausted establish the fact of exhaustion binding upon, its excess insurers?

3. Are any of the policies at issue here triggered if Fuller-Austin's "liabilities" exceed the policies' attachment points?

(a) What "liabilities" are to be considered?

(b) Are there critical dates for determining "liabilities?" If so, what are those dates?

4. Are there critical dates or events for determining if excess insurers' obligations have been triggered? If so, what re those dates or events?

5. Has exhaustion occurred as a matter of law because of the ruling in *Phoenix Ins. Co. v. U.S. Fire Ins. Co.* (1987) 189 Cal.App.3d 1511?

6. What is the legal effect of "drop down" provisions in "excess" policies or in "umbrella" policies?

7. What is the legal effect of insolvencies of underlying insurers?

8. What method of exhaustion is appropriate in this case; exhaustion of immediately underlying policies or exhaustion of all underlying insurance, in any years, i.e., horizontal or vertical exhaustion?

9. Under California and/or Louisiana law do the defendants' policies respond on a "continuous trigger" basis?

The Court further ordered that Phase IA of the trial would consist only of Issues #1 and #8 above and that Phase IB would consist of Issues #2 through #7 and #9. Phase IA commenced on December 4, 2000, and the parties rested on December 18, 2000. Closing arguments were held on May 14 and 15, 2001. Phase IA is the subject of this Statement of Decision.

B. Choice Of Law.

In earlier motions, the Court ruled that Louisiana law applies to the so-called Cities Services policies. Otherwise, the Court will apply California law to the interpretation of the policies.

C. Evidentiary And Procedural Stipulations Re: Phase IA.

Policy Stipulations: Trial Exhibits 1 through 110 are copies of the insurance policies including those issued by the excess insurers remaining in the case, those issued by insolvent insurers not in the case, and policies or policy-related documentation of primary and excess carriers who have settled before trial. The parties stipulated that they

would not object to the introduction at trial of Exhibits 1-110, the policies, all as are more fully listed in the Stipulation Regarding Insurance Policies signed by the parties during Phase IA.

The General or "First Wave" Document Stipulations #1-4 were pretrial agreements wherein Fuller-Austin waived certain evidentiary objections to four categories of documents produced as a result of defendants' Motions to Compel filed in 1999. These four stipulations were signed by the parties during Phase IA and are part of the Court's file.

A Procedural Stipulation for Phase IA arose out of a discussion held on the record on December 4, 2000, the first day of trial, concerning the purpose and admissibility of certain evidence sought to be introduced by plaintiff in Phase IA and the defendants' response to that proffer. This stipulation was adopted because the parties had different views of the relevancy and proper scope of Phase IA evidence. The Phase IA Procedural Stipulation adopted by the Court is part of the file in this action.

On March 14, 2001, a binding "Stipulation and Order Between Fuller-Austin and Highlands Insurance Company re 'Incorporation' Issues" (hereinafter "Fuller-Austin & Highlands Stipulation") was agreed upon by the aforementioned parties and ordered by this Court. Pursuant to the Fuller-Austin & Highlands Stipulation, several incorporation issues between the parties were resolved and set forth in the Stipulation. This Fuller-Austin & Highlands Stipulation is also part of the file in this action.

II. ISSUE #1 – INCORPORATION DISPUTES

A. Overview of Dispute.

The parties dispute whether certain provisions of the umbrella and underlying excess policies have been incorporated into the excess policies in the Fuller-Austin insurance program. The incorporation disputes in Phase IA arise from several basic circumstances. Many of the excess policies purport to incorporate underlying provisions from several different policies; these policies purportedly "follow form" of the underlying umbrella or excess policies. In many instances, the excess policies sit above layers of coverage shared by two or more underlying insurers. Thus, an area of dispute arises when the excess policy purports to incorporate provisions from multiple underlying policies, each of which also incorporates terms from other underlying policies. Further, the parties dispute whether only particular portions (e.g. sentences and words) of an underlying policy provision can be incorporated when the policy language to be incorporated from the underlying policies is inconsistent with the policy language contained in the excess policy at issue.

Fuller-Austin asserts that the aforementioned circumstances create ambiguities and inconsistencies, which should be construed against the insurance companies and, accordingly, resolved in favor of coverage for the insured. *See Rummel v. St. Paul Surplus Lines*, 123 N.M. 767 (1997). For example, Fuller-Austin suggests that, where the "following form" excess policy addresses a specific issue, it cannot incorporate language from an underlying policy that is more restrictive on the same issue. It argues that such a restriction would be inconsistent with the broader provision provided for in the excess policy.

In contrast, Joint Defendants argue that incorporation is not designed to expand or to limit coverage but rather to ensure that coverage between the underlying and excess policy remains uniform and seamless. Consequently, they assert, any doubts regarding incorporation should be resolved in favor of incorporation regardless of whether the incorporated clause expands or limits coverage.

B. Applicable Rules of Incorporation Analysis.

Excess insurance is designed to provide additional limits for the same type of coverage provided to an insured by primary or lower level policies. Absent specific policy language, it usually does not broaden the underlying coverage. *Wells Fargo Bank v. California Ins. Guarantee Ass'n*, 38 Cal.App.4th 936, 940, n.2 (1995).

To ensure uniformity of coverage throughout the layers of primary and excess coverage, the typical excess policy does not have a stand alone grant of coverage clause. Instead, the excess policy "follows form" or "incorporates" language from lower level policies to provide a complete grant of coverage. The clause in an excess policy which incorporates terms and conditions from a lower level policy is often referred to as a "following form" clause. Such a clause is generally designed to facilitate continuity and consistency in the layers of coverage purchased by the insured. "Following form gives the insured more uniform coverage and facilitates spreading risks among insurers." *Shell Oil Co. v. Winterthur Swiss Ins. Co.* 12 Cal.App.4th 715, 735 (1993). Incorporated provisions effectively become part of the following form excess policies, with the result that "[i]n a following form policy 'the excess has the same scope of coverage as the primary policy." *Wells Fargo*

Bank, supra, 38 Cal.App.4th at 941, n.4; *Coca Cola Bottling Co. v. Columbia Casualty Ins. Co.* 11 Cal.App.4th 1176, 1182-83 (1992).

Policies which "follow form" "are typically written on the same terms and conditions as the coverage provided by the underlying primary coverage. They are generally short, consisting of one or two pages, with an endorsement or provision that incorporates by reference the underlying policy coverages, except for the premium, the liability limits, and the obligation to investigate, defend, or pay costs of defense." *Coca Cola Bottling Co., supra*, 11 Cal.App.4th at p. 1183.

In determining the extent to which an excess policy incorporates terms and provisions from an underlying policy, the Court must examine all parts of these contracts together and give effect to every part, if reasonably practicable, each clause helping to interpret the other. *California Civil Code Section 1641*. Since the purpose of an excess insurance policy is to provide additional limits for the scope of coverage provided by lower level policies, the Court must look at the upper level excess and lower level underlying policies together, reading all as one contract to the extent possible, as the incorporated provisions from the underlying policies effectively become part of the excess policy. *California Civil Code Section 1642*; *Coca Cola Bottling Co., supra*, 11 Cal.App.4th at. p. 1183.

C. Rulings On Issue #1.

In resolving the incorporation issues raised by the parties, the Court has interpreted the relevant policy language by harmonizing the clauses in the various excess and underlying policies to ensure that the scope of coverage

afforded by the excess policies is consistent with that afforded by the lower level policies. The Court has not invoked the doctrine of "Burden of Proof" nor accepted any construction of policy language advanced by Fuller-Austin simply by reason of its status as an insured. In order to ensure uniformity of coverage between the policies issued by each of the Joint Defendants with the lower level policies purchased by Fuller-Austin, the Court adopts the following principles in ruling on the specific incorporation issues tried during Phase IA, as discussed more fully below:

1. The Court's rulings promote consistency of coverage throughout all layers of coverage in a given year.

2. Each of the Joint Defendants' policies (other than London policies bearing policy number CU 6499, CU 8118 and CU 10215, which are "stand alone" policies providing coverage for the period May 1, 1966, through June 1, 1971) "follows form" to an underlying policy or policies.

3. When an excess policy "follows form" to an underlying policy, incorporation of the underlying policy's provisions is the norm, with non-incorporation being the exception.

4. The excess policy and the underlying policy or policies it draws upon, must be read together and interpreted, if possible, in a manner which gives effect to all relevant provisions of both policies, excepting only those which are expressly excluded from incorporation or cannot be harmonized in whole or in part.

5. The fact that an excess and an underlying policy contain identical or similar subject matter headings, in

and of itself, does not preclude incorporation of underlying provisions beneath those headings.

6. The fact that provisions in an underlying policy deal with same or similar issues as are dealt with by provisions in an excess policy, in and of itself, does not preclude incorporation of that underlying provision.

7. The fact that an excess policy and an underlying policy contain language which is similar but not identical, in and of itself, does not preclude incorporation of such language from the underlying policy.

8. The fact that a clause or sentence(s) in an underlying policy provision is expressly excluded from incorporation, in and of itself, does not exclude the remainder of the underlying provision from incorporation.

9. The fact that a portion of a provision in an underlying policy is found to be inconsistent or otherwise excluded from incorporation, in and of itself, does not exclude the remainder of the provision from incorporation.

10. The fact that there is a dispute as to which underlying policy or policies an excess policy draws upon does not *ipso facto* create an ambiguity which either precludes incorporation or permits Fuller-Austin to choose which underlying policy provision is included.

Applying the foregoing principles, the Court has made particular findings concerning the disputed provisions for each policy at issue:

a. Highlands Insurance Company

The Court adopts the Stipulation between Highlands and Fuller-Austin.

b. The American Insurance Company

A. The American Insurance Company ("the American") issued a Following Form Blanket Excess Liability Policy, policy number XLX 136 22 92, to Dynalectron Corporation for the policy period from February 1, 1979 to July 1, 1980 (the "American Policy"). *Trial Exhibit 20, American Insurance Policy No. XLX 136 22 92.*

B. Holland-America Insurance Company issued an umbrella policy, policy number H882602, to Dynalectron Corporation for the policy period of February 1, 1979 to July 1, 1980 (the "Holland-America Policy"). The Holland-America Policy, *Trial Exhibit 34, Holland-America Policy No. H88260,* is one of the policies underlying the American Policy.

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the American Policy from any policy underlying the American Policy. *Trial Exhibit 20, American Insurance Policy No. XLX 136 22 92.*

D. As to the controverted issues relating to the American Policy, the Court rules as follows:

(a) The Holland-America Policy No. H88260's *(Trial Exhibit 34)* "Loss Payable" provision is not incorporated into the American Policy XLX 136 22 92. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence . . . *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

However, the balance of the Holland-America "Loss Payable" provision *(Trial Exhibit 34)* is incorporated into the American Policy XLX 136 22 92. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

(b) The Holland-America Policy's "Prior Insurance and Non-Cumulation of Liability" provision *(Trial Exhibit 34)* is incorporated into the American Policy XLX 136 22 92. It provides:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in Item [2] of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ C.*

c. Chicago Insurance Company

A. The Chicago Insurance Company ("Chicago") has one policy at issue, policy number 255U-0037285, in effect from July 1, 1984 to July 1, 1985. The Chicago Policy is an excess policy that shares a third layer of excess coverage with one other policy. *Trial Exhibit 10, Chicago Insurance Policy 255U-0037285.*

B. The Chicago "incorporation" provision states:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [ ] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 10, Chicago Insurance Policy 255U-0037285, Maintenance of Underlying Umbrella Insurance.*

C. Except as identified in paragraph D below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Chicago Policy from any policy underlying the Chicago Policy.

D. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(b) The first sentence of the Mission National Umbrella Policy #MN 034643 "Loss Payable" provision *(Trial Exhibit 72)* is not incorporated into the Chicago Policy 255U-0037285 *(Trial Exhibit 10)*. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall

> have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibit 72, Mission National Umbrella Policy, #MN 034643, Conditions, ¶ H.*

However, the balance of the Mission National Umbrella Policy # MN 034643's "Loss Payable" provision (*Trial Exhibit 72*) is incorporated into the Chicago Policy 255U-0037285 *(Trial Exhibit 10)*. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Conditions, ¶ H.*

d. CNA Insurance Company

A. The CNA companies have five policies at issue, consisting of one umbrella policy and four excess policies. They are:

Carrier/Type	Policy Num.	Policy Period	Ex. Num.
Columbia Casualty (Umbrella policy)	RDU 36 52 80	2/14/77 2/1/78	11
Columbia Casualty (Excess policy)	RDX 417 02 36	7/1/8 1 to 7/1//82	12
Transcontinental (Excess policy)	RDX 009 61 65 53	7/1/82 to 7/1/83	89
Transcontinental (Excess policy)	RDX 009 61 65 77	7/1/83 to 7/1/84	90
Transcontinental (Excess policy)	RDX 009 61 67 05	7/1/84 to 7/1/85	91

B. The CNA "incorporation" provision in the umbrella policy states:

> The company will indemnify the insured for loss in excess of the total applicable limits of liability of underlying insurance stated in the schedule. The provisions of the immediate underlying policy are, with respect to Coverage A, incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses, incident to any of the same, the amounts of the limits of liability, an 'other insurance' provision and any other provisions therein which are inconsistent with this policy. *Trial Exhibit 11, Columbia Casualty Umbrella Policy RDU 36 52 80, Coverage, ¶ 1 "Coverage A – Excess Liability Indemnity."*

C. The CNA definition of "immediate underlying policy" in the umbrella policy is:

> . . . the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately proceeding the layer of coverage . . . *Trial Exhibit 11, Columbia Casualty Umbrella Policy RDU 36 52 80, Definitions, "immediate underlying insurance."*

D. The CNA "incorporation" provisions of all the excess policies state:

> The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy. *Trial Exhibit 12, Columbia Casualty Excess Policy RDX 417 02 36, Part I – Insuring Agreement, "1. Excess Liability Indemnity;" Trial Exhibits 89, 90, and 91. Transcontinental Excess Policies RDX 009 61 65 53, RDX 009 61 65 77, and RDX 009 61 67 05, Part I – Insuring Agreement, "1. Excess Liability Indemnity."*

E. The CNA definition of "Immediate Underlying Policy" contained in the excess policies is:

> "Immediate underlying policy" means the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately preceding the layer of coverage provided by this policy. *Trial Exhibit 12, Columbia Casualty Excess Policy RDX 417 02 36, Part II – Definitions, "1. Immediate Underlying Policy,"*

Trial Exhibits 89, 90, and 91. Transcontinental Excess Policies RDX 009 61 65 53, RDX 009 61 65 77, and RDX 009 61 67 05, Part II – Definitions, "1. Immediate Underlying Policy."

F. No incorporation disputes exist regarding the CNA policies, except for those identified at Phase IA of Trial, as to which the Court makes the following rulings:

(a) "Loss Payable" Provisions

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the Loss Payable provisions from the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), and Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 36, Holland-America Insurance Company, Policy H-93688, Conditions, ¶ J.*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the Loss Payable provisions from the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*). All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ H*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the Loss Payable provision from the immediately underlying policy, Highland Insurance Company Policy No. 21833 (*Trial Exhibit 31*). The provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured

> or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the Loss Payable provisions from the immediate underlying policies, Chicago Insurance Company Policy 255U-0037285 (Trial Exhibit 10) and Highlands Insurance Company Policy No. 22207 *(Trial Exhibit 32)*. All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Conditions, ¶ H.*

(b) *"Prior Insurance" Provisions*

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Prior Insurance" provisions of the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), which, in turn, incorporate the provision from the Holland-America Insurance Policy H-93688 (*Trial Exhibit 36*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 36, Holland-America Insurance Policy H-93688, "Prior Insurance and Non-Cumulation of Liability."*

Additionally, Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Prior Insurance" provisions from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in II B shall be reduced by any amounts due to the insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an

> occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 28, Highlands Insurance Company Policy No. SR 21280, Conditions, ¶ I.*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Prior Insurance" provisions of the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*) and National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 71, Mission-National Insurance Policy MN # 009859, Conditions, ¶ C.*

Additionally, Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Prior Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21525 (*Trial Exhibit 30*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in II B shall be reduced by an amounts

> due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 30, Highlands Insurance Company Policy No. SR 21525, Conditions, ¶ I.*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the "Prior Insurance" provision of the immediately underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the "Prior Insurance" provisions of New England Insurance Company (Hartford) Policy 791331 (*Trial Exhibit 82*) and Mission-National Insurance Policy MN # 009859 (*Trial Exhibit 71*). The New England Insurance Company (Hartford) Policy 791331's prior insurance provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 4 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured

> for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 82, New England Insurance Company (Hartford) Policy 791331, Conditions, "1. Prior Insurance and Non-Cumulation of Liability."*

The Mission National Insurance Company Policy MN # 009859's prior insurance provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 71, Mission-National Insurance Policy MN # 009859, Conditions, "C. Prior Insurance and Non-Cumulation of Liability."*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Prior Insurance" provision of the immediately underlying policy, Chicago Insurance Company Policy 255U-0037285 (*Trial Exhibit 10*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof, the limit of liability hereon as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this

> Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 10, Chicago Insurance Company Policy 255U-0037285, Conditions, "1. Prior Insurance and Non Cumulation of Liability."*

(c) Pollution Exclusion

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the pollution exclusion provisions from the immediate underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*), and Highlands Insurance Company Policy No. SR 21524 (*Trial Exhibit 29*) which, in turn, incorporates the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (i).*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the pollution exclusion provision

from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (i).*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the pollution exclusion provisions of the immediately underlying policies, Chicago Insurance Company Policy No. 255U-0037285 (*Trial Exhibit 10*), and Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporate the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and

accidental. *Trial Exhibit 72, Mission-National Insurance Company Policy MN # 009859, Exclusions (h).*

(d) Assistance and Cooperation

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Assistance and Co-Operation" provision from the immediate underlying policies. Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), and Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*), which, in turn, incorporate the provision from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, "Assistance and Co-Operation."*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates "Assistance and Co-Operation" provisions from the immediate underlying policies, Integrity

Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*), which, in turn, incorporate the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates "Assistance and Co-Operation" provision from the immediate underlying policy, Highland Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted

> against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates "Assistance and Co-Operation" provisions from the immediate underlying policies, Chicago Insurance Company Policy 255U-0037285 (*Trial Exhibit 10*) and Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit*

72, Mission-National Insurance Company Policy MN # 034643, Conditions, ¶ F.

(e) Maintenance of Underlying Insurance

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Maintenance of Underlying Insurance" provisions from the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*) and Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), which, in turn, incorporate the provision from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). The provision states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, Conditions, ¶ S.*

Additionally, Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Maintenance of Underlying Umbrella Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). It states:

> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained herein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this Policy but in the event of such failures, the Company shall only be liable to the same extent as they would have been had the Named Insured complied with the said condition. *Trial Exhibit 28. Highlands Insurance Policy No. 21280, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Maintenance of Underlying Insurance" provisions from the immediately underlying policies Integrity Policy No. XL 206329 (*Trial Exhibit 43*) and National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained there in solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the

> Named Insured complied with the same condition. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ S.*

Additionally, Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Mai...enance of Underlying Umbrella Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 30*). It states:

> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained herein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this Policy but in the event of such failures, the Company shall only be liable to the same extent as they would have been had the Named Insured complied with the said condition. *Trial Exhibit 30, Highlands Insurance Policy No. 21280, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates "Maintenance of Underlying Insurance" provision from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in

> full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ S.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Maintenance of and Restrictions in Underlying Insurance" provision from the immediate underlying policy, Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporates the provision from the Mission-National Insurance company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial*

Exhibit 72, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ P.

Additionally, Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the Chicago Insurance Company Policy 255U-0037285's (*Trial Exhibit 10*) "Maintenance of Underlying Umbrella Insurance" provision. It states:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which is made hereunder. It is a condition of this policy that Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained therein solely by payment in respect of accidents and/or occurrences occurring during the period of this Policy or by the operation of Condition C of Underlying Umbrella Policies. *Trial Exhibit 10, Chicago Insurance Company Policy 255U-0037285, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

(f) Worker's Compensation Provisions

Columbia Casualty Umbrella Policy No. RDU 36 52 80 (*Trial Exhibit 11*) incorporates the following Worker's [sic] Compensation exclusion from the underlying American Home Policy No. GLA 343-24-19 (*Trial Exhibit 5*):

This insurance does not apply . . .

(vii) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's [sic] compensation, unemployment compensation or disability benefits law, or under any similar law. *Trial Exhibit 5, American Home Policy.*

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Worker's [sic] Compensation" exclusion from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). It states:

This Policy is subject to the following exclusions:

This policy does not apply –

to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Worker's Compensation" exclusion provision from the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*), National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. 21525 (*Trial Exhibit 30*), which, in turn, incorporate the exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the "Worker's Compensation" exclusion provision from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Worker's Compensation" exclusion provision from the immediate underlying policies,

Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*) and Chicago Insurance Company Policy 255U-0037285's (*Trial Exhibit 10*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by he Named Insured under contract or agreement. *Trial Exhibit 72, Mission-National Insurance Company Policy MN # 034643, Exclusions (a).*

(g) Integrity Provisions

Columbia Policy No. RDX 417 02 36 (*Trial Exhibit 12*), Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*), and Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporate the following "Notice of Loss" provision from the underlying Integrity Insurance Company policies:

> Notice of Loss. The insured shall immediately advise the Company of any accident or occurrence which appears likely to result in liability under this Policy and of subsequent developments likely to affect the Company's liability herein under. At no time shall the Company be

called upon to assume charge of the settlement or defense of any claims made or suits brought or proceedings instituted against the Insured, but the Company shall have the right and shall be given the opportunity to associate with the Insured or its underlying insurer or insurers, or both, in the control, defense and/or trial of any claims, suits or proceeding which, in the opinion of the Company, involves or appears reasonably likely to involve the Company. If the company avails itself of such right and opportunity, the Insured, any underlying insurer or insurers and the Company shall cooperate in the control, defense and/or trial of such claims, suits or proceedings, so as to affect a final determination thereof. Failure on the part of the insured or the underlying insurer or insurers to cooperate shall relieve the Company, at its option, of liability under this Policy.

The Insured shall be solely responsible for the investigation, settlement, defense and final disposition of any claim made or suit brought or proceeding initiated against the Insured to which this Policy would apply and which no underlying insurer or insurers is obligated to defend. The insured shall use due diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the insured shall not make or agree to any settlement for any sum in excess of the underlying insurance, without the approval of the company. *Trial Exhibit 42, Integrity Insurance Company Policy No. XL 203282, Terms and Conditions, Notice of Loss, ¶¶ 8 and 9; Trial Exhibit 43, Integrity Insurance Company Policy No. XL 206329, Terms and Conditions, Notice of*

Loss, ¶¶ 8 and 9, Trial Exhibit 44, Integrity Insurance Company Policy No. XL 208582, Terms and Conditions, Notice of Loss, ¶¶ 8 and 9.

e. Federal Insurance Company

A. The Federal Insurance Company ("Federal") has four policies at issue in Phase 1A. Each policy has the same policy number. They are:

Policy Number	Policy Period	Ex. Number
7935 72 05	7/1/81 to 7/1/82	16
	7/1/82 to 7/1/83	17
	7/1/83 to 7/1/84	18
	7/1/84 to 7/1/85	19

For the 1981/1982 policy year, the Federal policy was a fifth level excess policies. For the 1982/1983 and 1984/1985 policy years, the Federal policy shared the fourth tier of excess coverage with Transcontinental policies. For the 1983/1984 policy year, the Federal policy shared the fifth tier of excess coverage with Transcontinental policies.

B. The Federal "incorporation" provision states:

> In consideration of the payment of the required premium and subject to all the terms of this policy, the Company agrees to pay on behalf of the insured LOSS resulting from any occurrence insured by the terms and provisions of the First UNDERLYING INSURANCE policy scheduled in Item 6 of the Declarations (except for the Limits of Liability and defense provisions, if any). *Trial Exhibits 16, 17, 18, and 19, Federal Insurance Company Policy 7935 72 05, Policy Provisions, "1. Insuring Agreement."*

C. The Federal definition of "Loss" states:

> LOSS – Meaning the amount of the principal sum, award or verdict, actually paid or payable in cash in the settlement or satisfaction of claim for which the Insured is liable, either by adjudication or compromise with the written consent of the Company, after making deductions for all recoveries and salvage. *Trial Exhibits 16, 17, 18, and 19, Federal Insurance Company Policy 7935 72 05, Policy Provisions, "4. Glossary."*

D. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Federal Policies from any policy underlying the Federal Policies.

E. As to the controverted issues relating to incorporation, the Court rules:

(a) The Federal Insurance Company Policies 7935 72 05 (*Trial Exhibits 16, 17, 18, and 19*) incorporate the portion of the "Loss Payable" provisions, set forth below, of the 1981-1982 Holland-America Insurance Policy H-93688 (*Trial Exhibit 36*), the 1982-1984 Mission National Insurance Policy # MN 009859 (*Trial Exhibit 71*), the 1984-1985 Mission National Insurance Policy #MN 034643 (*Trial Exhibit 72*). The Holland-America Insurance Policy H-93688's provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by

> written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 36, Holland-America Insurance Company, Policy H-93688, Conditions, ¶ J.*

The Mission National Insurance Policies # MN 009859 and # MN 034643 provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ J, Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Condition ¶ H.*

f. The "Hartford" Insurance Companies

A. The Hartford companies have three excess policies at issue:

Carrier	Policy Number	Policy Period	Ex. Number
First State	924273	2/14/77 to 3/15/78	21
New England Re	791331	7/1/83 to 7/1/84	82
Twin City	TXS 102899	7/1/83 to 7/1/84	92

B. The First State Policy No. 924273's (*Trial Exhibit 21*) "incorporation" provision states:

> This policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 21, First State Policy No. 924273, Conditions, "2. Maintenance of Underlying Insurance."*

C. The New England Policy No. 791331's (*Trial Exhibit 82*) "incorporation" provision states:

> This policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item 5

> of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 82, New England Policy No. 791331, Conditions, "2. Maintenance of Underlying Insurance."*

D. The Twin City Policy No. 102899's (*Trial Exhibit 92*) "incorporation" provision states:

> Except as otherwise provided by this policy, the insurance afforded herein shall follow all the terms, conditions, definitions and exclusions of the controlling underlying insurance policy designated in Item 6 of the declarations. *Trial Exhibit 92, Twin City Policy No. 102899, Conditions, "2. Maintenance of Underlying Insurance."*

E. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Hartford Policies from any policy underlying the Hartford Policies.

F. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) The first sentence of the "Loss Payable" provision of the Mission National Umbrella Policy # MN 009859 (*Trial Exhibit 71*) is not incorporated into New England Policy No. 791331 (*Trial Exhibit 82*) or Twin City Policy No. TXS 102899 (*Trial Exhibit 92*). It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibits 71, Mission National Umbrella Policy # MN 009859, Conditions, Loss Payable, ¶ J.*

The balance of the Mission National Umbrella Policy "Loss Payable" provision, consisting of three sentences, is incorporated into New England Policy No. 791331 (*Trial Exhibit 82*) and Twin City Policy No. TXS 102899 (*Trial Exhibit 92*). These sentences state:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proved in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, Loss Payable, ¶ J.*

(b) Although not disputed by the Hartford Insurance Company, the Service of Suit endorsement ("Assistance and Cooperation" provision) contained within the Columbia Casualty (CNA) Policy RDU 36 52 80 *(Trial Exhibit 11)* is not incorporated into First State Policy No. 924273 (*Trial Exhibit 82*).

g. Home Insurance Company

A. Home Insurance Company Policy No. HEC 9006863 (*Trial Exhibit 37*) was issued for the period

beginning on February 1, 1977 and expiring on March 2, 1978. The Home Insurance Policy is an excess policy that shares a third layer of coverage with two other policies.

B. There are two provisions in Home's Policy discussing incorporation. The first "incorporation" provision states:

> This Policy is subject to the same warranties, terms and conditions (except as otherwise provided herein) as are contained in or as may be added to the Underlying Coverage prior to the happening of an accident or occurrence, whichever is applicable, for which claim is made hereunder . . . *Trial Exhibit 37, Home Insurance Policy No. HEC 9006863, Conditions, "1. Maintenance of Underlying Insurance."*

The other "incorporation" provision states that the excess coverage is afforded under:

> the same terms, conditions and exclusions of the Columbia Casualty Insurance Company Policy No. (to be advised) and excess of the limits set forth in Item 2 . . . *Trial Exhibit 37, Home Insurance Policy No. HEC 9006863, Item 3, "Excess Coverage Afforded by this Policy."*

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Home Insurance Company from any policy underlying that policy.

D. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) Home's Insurance Company Policy No. HEC 9006863 *(Trial Exhibit 37)* incorporates the terms, conditions and exclusions of the Columbia Casualty Insurance

Company (CNA) Umbrella Policy No. RDU 365 28 50 (*Trial Exhibit 11).*

(*b*) Home Insurance Company Policy No. HEC90006863 (*Trial Exhibit 37*) incorporates the "Other Insurance" provision contained within the Columbia Casualty Insurance Company (CNA) Policy No. RDU 365 28 50 *(Trial Exhibit 11).* This provision states:

> If, with respect to loss and ultimate net loss covered hereunder, the insured has other insurance, whether primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects loss and ultimate net loss: provided, that if the limit of liability of this policy is greater than the limit of liability provided by the other insurance, this policy shall afford excess insurance over and above other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the limit of liability afforded by this policy.
>
> This condition does not apply with respect to the underlying insurance or excess insurance purchased specifically to be in excess of this policy. *Trial Exhibit 11, Columbia Casualty Insurance Company (CNA) Policy No. RDU 365 28 50, Conditions, ¶ 10 "Other Insurance."*

h. The International Insurance Company

A. International Insurance Company ("International") as the successor-in-interest to International Surplus Lines Insurance Company ("ISLIC"), has one policy at issue, Policy No. XSI 7030 effective 7/1/80 – 7/1/81 *(Trial Exhibit 45).*

B. The ISLIC Policy No. XSI 7030 "incorporation" provision states:

> The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part I – Insuring Agreements, "1. Excess Liability Indemnity."*

C. The ISLIC Policy No. XSI 7030's definition of "Immediate Underlying Policy" states:

> "Immediate underlying policy" means the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately preceding the layer of coverage provided by this policy. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part III – Definitions, "1. Immediate Underlying Policy."*

D. Endorsement No. 6 to ISLIC Policy XSI 7030 identifies the three policies immediately below the ISLIC policy: Lexington Insurance Company Policy No. 5521800 *(Trial Exhibit 52)*, Integrity Insurance Company Policy No. XL201746 *(Trial Exhibit 41)* and Highlands Insurance Company Policy No. SR 21090 (*Trial Exhibit 26*). Each of these three policies contains its own "following form" provision. Thus, these three policies incorporate certain provisions from the policies underlying them in the 7/1/80 – 7/1/81 policy year: Lexington Insurance Company Policy No. 5521799 *(Trial Exhibit 51)*, Highlands Insurance Company Policy No. 21089 *(Trial Exhibit 25)* and Holland-America

Insurance Company ("Holland-America") Policy No. H88300 *(Trial Exhibit 35).*

E. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the ISLIC Policy.

F. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(a) Holland-America Insurance Company Policy No. H88300's (*Trial Exhibit 35*) "Loss Payable" provision is incorporated into ISLIC XSI 7030 *(Trial Exhibit 45).* It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the [Insured], or the [Insured's] underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The [Insured] shall make a definite claim for any loss for which the [Insurer] may be liable under the policy within twelve (12) months after the [Insured] shall have paid an amount of ultimate net loss in excess of the amount borne by the [Insured] or after the [Insured's] liability shall have been fixed and rendered certain either by final judgment against the [Insured] after actual trial or by written agreement of the [Insured], the claimant, and [Insurer]. . . . *Trial Exhibit 35, Holland-America Policy, Conditions, ¶ J.*

(*b*) The following provision from the Integrity Insurance Company Policy XL201746 is incorporated into ISLIC XSI 7030. It states:

> The Company's obligation to pay any ultimate net loss and costs with respect to any accident or occurrence falling within the term of this Policy

> shall not attach until the amount of the applicable underlying limit has been paid by or on behalf of the Insured on account of such accident or occurrence. The Insured shall make claim for any ultimate net loss or costs under this Policy within a period of not exceeding twelve (12) months after, (a) the Insured shall have paid ultimate net loss in excess of the underlying limit, with respect to any accident or occurrence, or (b) the Insured's obligation to pay such amounts shall have been finally determined, either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the company. *Trial Exhibit 41, Integrity Insurance Company Policy, Terms and Conditions, Loss Payable, ¶ 11.*

(c) The following provision from the Integrity Insurance Company Policy XL201746 is incorporated into ISLIC XSI 7030. It states:

> . . . The Insured shall use due diligence and prudunce to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the Insured shall not make or agree to any settlement for any sum, in excess of the underlying insurance, without the approval of the Company. *Trial Exhibit 41, Integrity Insurance Company Policy, Terms and Conditions, Notice of Loss, ¶ 9.*

(d) The following provision from the Lexington Insurance Policy No. 5521800 *(Trial Exhibit 52)* is incorporated into ISLIC XSI 7030. It states:

> Liability of the Company under this policy shall not attach unless and until the Insured or the Insureds' Underlying Insurance has paid or has been held liable to pay the total applicable underlying

limits. *Trial Exhibit 52, Lexington Insurance Company Policy No. 5521800, "1. Insuring Agreement."*

i London Market Insurance Company

D. London Market Insurers subscribed to the following policies that are at issue in this portion of the litigation:

Policy/Type	*Period*	*Trial Ex Number*
CU10216/Excess	5/1/68-6/1/71	66
53086/Excess	1/1/76-1/31/77	61
53386/62474/Excess	1/31/77-3/2/78	67
53658/62739	3/2/78-2/1/79	68
53930/62955/Excess	2/1/79-7/1/80	69
54362/63289/Excess	7/1/80-7/1/81	70

E. London Market Policies CU 10216 *(Trial Exhibit 66)*, 53086 *(Trial Exhibit 61)*, and 53386 *(Trial Exhibit 67)* "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [2] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibits 66, 61, and 67, London Market Policies CU 10216, 53086, and 53386, Conditions, "Maintenance of Underlying Umbrella Insurance."*

C. The London Market Policies 54362 *(Trial Exhibit 70)* and 53930 *(Trial Exhibit 69)* "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [2] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. Should, however, any alteration be made in the premium for the Underlying [Umbrella] Policies during the currency of this Policy, Underwriters reserve the right to adjust the premium hereon accordingly. *Trial Exhibits 70, 69, and 68, London Market Policies 54362, 53930, and 53658, Conditions, "Maintenance of Underlying Insurance."*

D. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the London Market Policies from any policy underlying the London Market Policies.

E. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) Loss Payable Provisions

Concerning London Market Excess Policy CU 10216 *(Trial Exhibit 66)*, the first sentence of the "Loss Payable" provision of the immediately underlying London Market Excess Umbrella Policy, CU 10215 *(Trial Exhibit 65)*, is not incorporated. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ J.*

However, the balance of the London Market Excess Umbrella Policy "Loss Payable" provision, consisting of three sentences, is incorporated into London Market Excess Policy CU 10216 *(Trial Exhibit 66).*

> The [Assured] shall make a definite claim for any loss for which the [Underwriters] may be liable under the policy within twelve (12) months after the [Assured] shall have paid an amount of ultimate net loss in excess of the amount borne by the [Assured] or after the [Assured's] liability shall have been fixed and rendered certain either by final judgment against the [Assured] after actual trial or by written agreement of the [Assured], the claimant, and [Underwriters]. If any subsequent payment shall be made by the [Assured] on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ J.*

Concerning London Market Excess Policy 53086 *(Trial Exhibit 61)*, the first sentence of the "Payment of Loss" provision of the immediately underlying Wausau Policy No. 2226-03-030862 *(Trial Exhibit 110)* is not incorporated. It states:

> The company shall not be obligated to make any payment under this policy of any loss until all amounts not in excess of the retained limit have been paid by others. *Trial Exhibit 110, Wausau Policy No. 2226-03-030862, Conditions, "Payment of Loss."*

However, the remaining balance of the Wausau Policy No. 2226-03-030862 *(Trial Exhibit 110)* "Payment of Loss" provision, is incorporated into the London Market Excess Policy 53086 (*Trial Exhibit 61*). It states:

> The Company shall thereafter pay promptly all claims due under this policy. *Trial Exhibit 110, Wausau Policy No. 2226-03-030862, Conditions, "Payment of Loss."*

Concerning London Market Excess Policy 53930 *(Trial Exhibit 69)* the American Policy (Fireman's Fund) XLX 136 22 92's (*Trial Exhibit 20*) "Loss Payable" provision, which is incorporated from the Holland-America Policy No. H88260's Loss Payable provision, *(Trial Exhibit 34)*, is incorporated. The incorporated provision states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30)

> days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the "Loss Payable" provision of the ISLIC Policy XSI 7030 *(Trial Exhibit 45)*, which is incorporated from the Holland-America Policy No. H88300's *(Trial Exhibit 35)* Loss Payable provision, is incorporated. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 35, Holland-America Policy No. H88300, Conditions ¶ J.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the definition of "Loss" contained in the ISLIC Policy XSI 7030 *(Trial Exhibit 45)*, is incorporated in its entirety. It states:

> "Loss" means the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages and other instrument (whether recoverable or not) other than

> the underlying insurance and excess insurance purchased specifically to be in excess of this policy. "Loss" does not include investigation, adjustment, defense or appeal costs and expenses nor costs and expenses incident to any the same, notwithstanding that the underlying insurance may provide insurance for such costs and expenses. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part 11 – Definitions, "1. Immediate Underlying Policy."*

(b) "Prior Insurance" Provisions

Concerning London Market Excess Policy 53086 *(Trial Exhibit 61)*, the immediately underlying Wausau Policy 2226-03-030862's *(Trial Exhibit 110)* "Non-cumulation of liability" provision is incorporated. The provision states:

> If the same occurrence gives rise to personal injury, property damage or advertising injury that occurs partly before and partly within any one annual period, the limit of liability applicable to each such occurrence and any aggregate limit of liability applicable to such injury or damage shall be reduced by the amount of all payments made by the company with respect to such occurrence, either under a previous policy or policies issued by the company of which this is a replacement, or under this policy with respect to previous annual periods thereof. *Trial Exhibit 110, Wausau Policy 2226-03-030862, IV, Limits of Liability, (c) Non-cumulation of liability.*

Concerning London Market Policy 53086 (*Trial Exhibit 61*), the immediate underlying Wausau Policy 2226-03-030862, *(Trial Exhibit 110)* "Other Insurance With the Company" clause is incorporated. It states:

> If collectible insurance under any other policy issued by the company is available to the insured

> covering a loss also covered by this policy, the company's total liability under all such policies as respects such loss shall not exceed the greatest applicable limit of liability; provided, that this condition does not apply to insurance written by the company as underlying insurance or as insurance in excess of this policy. *Trial Exhibit 110, Wausau Policy 2226-03-030862, Conditions, ¶ 8.*

Concerning London Market Policy CU 10216 *(Trial Exhibit 66)*, the immediately underlying London Market Excess Umbrella Policy's CU 10215 *(Trial Exhibit 65)* "Prior Insurance" provision is incorporated. It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in item [] of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurances.
>
> Subject to the foregoing paragraph, and to all the other terms and conditions of this policy in the event that personal injury or property damage, arising out of an occurrence covered hereunder is continuing at the time of termination of this policy Underwriters will continue to protect the Assured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ C "Prior Insurance."*

(b) Notice of Occurrence Provision

Concerning London Market Excess Policy 53930/62955 *(Trial Exhibit 69)*, the underlying American Policy XLX 136-22-92's *(Trial Exhibit 20)* "Notice of Occurrence" provision is incorporated. It states:

> The Company shall not, however, be called upon to assume charge of the settlement or defense of any claims made, or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of the policy. If the Company avails itself of such right and opportunity, the Insured and the Company shall cooperate in all respects so as to effect a final determination of the claim or claims. *Trial Exhibit 20, American Policy XLX 136-22-92, Conditions, ¶ 2.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the ISLIC Policy XLX XSI 7030's *(Trial Exhibit 45)* "Notice of Loss" Provision from is incorporated. It states:

> Notice of an occurrence which appears likely to involve this policy shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. The company at its own option may, but is not required to, participate in the investigation, settlement or defense of any claim or suit against the insured. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part V – Conditions, "2. Notice of Loss: Participation in Defense by the Company."*

(c) "Occurrence" Definition

As Coverage Part "A" as defined in the underlying CNA Umbrella Policy RDU 3652850 *(Trial Exhibit 11)* applies to the asbestos claims at issue, London Market Excess Policy 53386 *(Trial Exhibit 67)*, incorporates the occurrence definition from the primary American Home Policy GLA 3432419 *(Trial Exhibit 5)*. It states:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. *Trial Exhibit 5, American Home Insurance Company Policy GLA 3432419, "Occurrence."*

(d) "Consent" and "Defense" Provisions

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the following language from the ISLIC Policy XLX XSI 7030 (*Trial Exhibit 45*), is incorporated:

> The company at its own option may, but is not required to participate in the investigation, settlement or defense of any claim or suit against the insured. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part V – Conditions, "2. Notice of Loss: Participation in Defense by the Company."*

Additionally, the following language from the underlying Integrity Insurance Company Policy XL 201746 *(Trial Exhibit 41)* is incorporated:

> The Insured shall be solely responsible for the investigation, settlement, defense and final disposition of any claim made or suit brought or proceeding instituted against the Insured to

> which this Policy would apply and which no underlying-insurer or insurers is obligated to defend. The Insured shall use due diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the Insured shall not make or agree to any settlement for any sum, in excess of the underlying insurance, without the approval of the Company. *Trial Exhibit 41, Integrity Insurance Company Policy XL 201746, Terms and Conditions, Notice of Loss, ¶ 9.*

Concerning London Market Excess Policy 53930 *(Trial Exhibit 69)*, the following language from the underlying American Insurance Company (Fireman's Fund) Policy XLX 136-22-92 *(Trial Exhibit 20)*, is incorporated:

> The Company shall not, however, be called upon-to-assume charge of the settlement or defense of any claims made, or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of the policy. If the Company avails itself of such right and opportunity the Insured and the Company shall cooperate in all respects so as to effect a final determination of the claim or claims. *Trial Exhibit 20, American Insurance Policy XLX 136-22-92, "Notice of Occurrence."*

Concerning London Market Excess Policy 53386 *(Trial Exhibit 67)*, the Columbia Casualty (CNA) Umbrella Policy's RDU 3652850 *(Trial Exhibit 11)* "Settlement of

Claims or Suits" provision is not incorporated. This clause by its very terms applies to injuries under "Coverage B;" injuries sustained in this matter fall under "Coverage A."

j. Stonewall Insurance Company

A. Stonewall Insurance Company ("Stonewall") issued the following policies:

Policy Number	*Policy Period*	*Exhibit Number*
D11366	1/3/73 to 1/24/73	88
12173	12/31/73 to 12/31/75	87

B. The Stonewall "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which claim is made hereunder: *Trial Exhibits 88 and 87, Stonewall Insurance Company Policies D11366 and 12173, Conditions, "2. Maintenance of Underlying Insurance."*

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Stonewall Policies from any policy underlying the Stonewall Policies.

D. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(a) Concerning Stonewall Insurance Company Policy D11366 *(Trial Exhibit 88)*, the first sentence of the "Loss Payable" provision of the underlying Appalachian Insurance Umbrella Policy 71030 *(Trial Exhibit 9)*, is not incorporated. It states:

> Liability of the company with respect to any one occurrence shall not attach unless and until the insured, or the insured's underlying insurer, has paid the amount of the retained limit. *Trial Exhibit 9, Appalachian Insurance Umbrella Policy 71030 Conditions, ¶ H.*

However, the balance of the underlying Appalachian Insurance Umbrella Policy's "Loss Payable" provision is incorporated. It states:

> The Insured shall make a definite claim for any loss for which the company may be liable within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the insured or after the insured's liability shall have been made certain by final judgment against the insured after actual trial, or by written agreement of the insured, the claimant, and the company. If any subsequent payments are made by the insured on account of the same occurrence, additional claims shall be made similarly from time to time and shall be payable within thirty (30) days after proof in conformity with this policy. Liability of the company with respect to any one occurrence shall not attach unless and until the insured, or the insured's underlying insurer, has paid the amount of the retained limit. *Trial Exhibit 9, Appalachian Insurance Umbrella Policy 71030 Conditions; ¶ H.*

(b) Concerning Stonewall Insurance Company Policy 12173 *(Trial Exhibit 87)*, the underlying Wausau Insurance Policies' No. 2225-03-030862 and 2226-00-030862 *(Trial Exhibits 108 and 109)* "Payment of Loss" provisions are not incorporated. Both provisions state:

> The company shall not be obligated to make any payment under this policy for any loss until the amounts not in excess of the retained limit have been paid by others. The company shall thereafter pay promptly all claims due under this policy. *Trial Exhibits 108 and 109, Wausau Insurance Company* (Policies') *No. 2225-03-030862 and 2226-00-030862, Conditions, "6. Payment of Loss."*

(c) Concerning Stonewall Insurance Company Policy 12173 (*Trial Exhibit 87*), the underlying Wausau Insurance Policies' No. 2225-03-030862 and 2226-00-03086 *(Trial Exhibits 108 and 109)* "Other Insurance With the Company" are incorporated. Both provisions state:

> If collectible insurance under any other policy issued by the company is available to the insured covering a loss also covered by this policy, the company's total liability under all such policies as respects such loss shall not exceed the greatest applicable limit of liability; provided, that this condition does not apply to insurance written by the company as underlying insurance or as insurance in excess of this policy. *Trial Exhibits 108 and 109. Wausau Insurance Company Policy Nos. 2225-03-030862 and 2226-00-030862, Conditions, ¶ 8.*

III. ISSUE #8 – METHOD OF EXHAUSTION

A. Overview of Dispute

Fuller-Austin contends that the Joint Defendants' policies are all on the risk (i) once the liability exceeds the amount of underlying liability insurance that is directly below the specific excess liability insurance policy, or (ii) once the immediate underlying liability insurance policies have been exhausted. Fuller-Austin's position sometimes is referred to as "vertical" exhaustion or attachment. The Joint Defendants contend that no umbrella or excess policies are on the risk until all underlying insurance, in all years, has been exhausted. The Joint Defendants' position is sometimes referred to as "horizontal layer-by-layer" exhaustion.

B. Overview of Horizontal and Vertical Exhaustion

Under the doctrine of horizontal exhaustion, "an excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until all of the primary insurance has been exhausted." *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal.App. 4th 329, 339 (1996). "Absent a provision in the excess policy specifically describing and limiting the underlying insurance, a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose* [*Montrose Chemical Corp. of California v. Admiral Insurance Co., 10 Cal.4th 645 (1995)*]." *Montgomery Ward & Co. v. Imperial Casualty and Indemnity Co.*, 81 Cal.App.4th 356, 365 (2000). In asbestos-related cases, California courts generally employ horizontal exhaustion to "spread" the claims across all relevant years in a layer-by-layer

basis. *Montgomery Ward & Co., supra*, 81 Cal.App.4th at p. 365.

Under the doctrine of vertical exhaustion, an excess policy is on the risk "when the limits of a specifically scheduled underlying policy is exhausted and the language of the excess policy provides that it shall be excess only to that specific underlying policy." *Community Redevelopment Agency, supra*, 50 Cal.App.4 at 339-40.

C. Applicable Rules of Exhaustion Analysis

Insurance policies, as contracts, must be interpreted according to the same rules that govern all contracts. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264 (1992). The basic rule is that contracts are to be interpreted according to the parties' mutual intent at the time of contracting. *Id; California Civil Code § 1636.* If the language of the contract is clear and explicit and does not involve an absurdity, *Civil Code § 1638* requires that "the language in a contract is to govern its interpretation." *Waller v. Truck Insurance Exchange*, 11 Cal.4th 1, 18 (1995).

Where courts have interpreted a term in an insurance policy, the judicial interpretation controls unless the parties specifically expressed a different intent at the time the contract was formed. *Collin v. American Empire Ins.*, 21 Cal.App.4th 787, 810 (1994); *Bartlome v. State Farm Fire & Cas. Co.*, 208 Cal.App.3d 1235, 1239 (1989). Thus, where courts have interpreted a policy term, evidence regarding its meaning is irrelevant, except evidence showing that, at the time of contracting, the specific parties intended a different meaning. *Id.*

The Court provisionally received certain evidence offered by plaintiff, subject to motions to strike. This provisional evidence was offered for "context" and in order to determine whether the mutual intent of the parties at the time of contracting was such that the plain language of the contracts, taken together with previous judicial interpretation of similar policies, should not control. *PG&E v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39-40 (1968). When a party proffers its interpretation of a contract, the Court may give at least preliminary consideration to credible evidence offered by that party to support its proffered meaning in order to determine whether the contract language is reasonably susceptible to the meaning proffered by that party. The *Thomas Drayage* process was explained in *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, citing *Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 45: "The decision whether to admit parole evidence involves a two-step process. First, the court provisionally received (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e. whether the language is 'reasonably susceptible' to the interpretation urged by a party." While the court may provisionally receive evidence of the parties' intentions as an initial step, if the extrinsic evidence offered is not probative of the mutual intentions of the parties at the time of contracting, it must ultimately be rejected, rather than admitted into, as evidence. *PG&E v. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39-40 (1968); Jefferson, *California Evidence Benchbook*, Third Ed., Vol.2, sections 32.14 and 32.23, pp. 676-681. That is the process this Court has followed.

D. Rulings On Issue #8.

Having heard the evidence, the Court finds that the evidence proffered by Fuller-Austin was not probative of the mutual intent of the parties to the contracts *at the time of contracting.* No evidence was offered which shows that the parties to these insurance contracts attributed a special meaning to the policies or had a specific intent at the time of contracting which would allow these policies to be interpreted in a way different than mandated by previous judicial interpretations.[1] Accordingly, the policy language, as interpreted by case law construing similar types of policies, controls.

Much of the extrinsic evidence offered by plaintiff was generated after the dispute arose and/or is subjective "expectation" evidence. Both such categories of evidence are irrelevant in interpreting contracts and, as set forth below, are inadmissible. *Fireman's Fund Ins. v. Fibreboard Corp.*, 182 Cal.App.3d 462, 469, n.3 (1986); *Wolf*

[1] The Court notes that there was undisputed testimony by various Insurers' underwriters that as a matter of custom and practice, when underwriting excess and umbrella policies, they look only at the underlying coverage in the year covered by the policy they are underwriting. They do not consider insurance purchased in previous years or that to be purchased in future years. Fuller-Austin asks the Court to conclude from that custom and practice of contemporary underwriters that the underwriters who actually underwrote the policies in question years ago intended that the policies would exhaust vertically. The Court is sympathetic to Fuller-Austin's point that it is anomalous that Insurers would calculate premiums on that basis and then expect the policies to exhaust horizontally. But there are certainly reasonable explanations for calculating premiums based only on the year in question, without regard to a particular method of exhaustion, not the least of which is the difficulty of calculating premiums based on an Insured's representations regarding its intent to purchase insurance in the future.

Machinery Co. v. Ins. Co. of North America, 133 Cal.App.3d 324, 328-329 (1982). However, even if the Court were to have admitted such evidence, it would not have changed the Court's determination that the policies are unambiguous as to Issue #8 and that the law as set forth herein should apply.

Upon review of the language of the applicable primary policies, this Court concludes that all of Fuller-Austin's applicable primary policies must be exhausted before any excess policy attaches. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1850 (1996). (Rulings concerning what "exhausted" means will be the subject of portions of Phase IB). See also, *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593, 597 (1981), *Community Redevelopment Agency, supra*, 50 Cal.App.4th at p. 337; *California Civil Code § 1636, 1638.* Further, upon review of the language of the umbrella and excess policies, the Court further holds that the general principles of horizontal exhaustion apply at the excess layers as well. This is true despite Fuller-Austin's argument that some policy language refers only to the underlying policies in a given year. In those instances, additional policy language refers to exhaustion of other prior valid and collectable insurance before those excess policies are at the risk; such language supports the conclusion that these policies exhaust horizontally.

As stated in *Stonewall v. City of Palos Verdes Estates, supra*, horizontal exhaustion is most consistent with the continuing trigger under California law for continuing injury cases. Accordingly, the adoption of horizontal exhaustion in this instance means that Fuller-Austin must

prove individually as to each excess policy, that the limits of all applicable[2] underlying insurance are exhausted on a horizontal basis. Underlying insurance means all insurance at a lower level of attachment during the entire *horizontal* period. Since whether a policy has been exhausted is an issue reserved for a future phase of this trial, the Court, at this time, need only rule upon which method of exhaustion is appropriate. Based upon the aforementioned principles and the specific policy language, the Court adopts a horizontal method of exhaustion. *Stonewall Ins. Co. v. City of Palos Verdes Estates, supra*, 46 Cal.App.4th at p. 1850; *Olympic Ins., supra*, 126 Cal.App.3d 593, *Community Redevelopment Agency, supra*, 50 Cal.App.4th 329; *California Civil Code § 1636, 1638.*

IV. CONCLUSION

As this is a decision on one phase of a multi-phase case, no party is determined to be a prevailing party.

July 31, 2003

/s/ Judith C. Chirlin
JUDITH C. CHIRLIN

---

[2] This ruling necessitates an analysis of the "occurrence" definitions in the policies, critical to determination of exhaustion issues in future phases of this case. The definitions of "occurrence" in the primary and excess policies fall within two categories. (For a detailed breakdown of these categories, see Appendix A, which is incorporated in full herein.)

The significance of the existence of the two categories can best be explained using an analogy suggested by the Joint Insurers. They likened horizontal exhaustion to the filling of a bathtub. That would be appropriate in this case if all of the policies contained the same definition of "occurrence." As set forth above, they do not. Because there are two different definitions of "occurrence" in the policies, a more appropriate analogy would be the filling of two bathtubs. The sequence, timing and method of filling the two bathtubs is left for another day.

Appendix A – Definitions of "Occurrence"

Upon review of the subject policies, the Court has found two definitions of occurrence. Policies either define one "occurrence" as exposure to substantially the same general conditions existing at or emanating from one premises location ("Definition Group A") or deem one "occurrence" as all damages arising out of such exposure to substantially the same general conditions, regardless of location ("Definition Group B"). Below are the findings of this Court.

Definition Group A

1966-1967

Excess Policy London Market Insurance Company's Policy CU 6499/CL 97099 (*Trial Exhibit 62*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 62, London Market Insurance Company Policy CU 6499, Definitions, "Occurrence."*

1967-1968

Excess Policy London Market Insurance Company's Policy CU 8118/CL 98708 (*Trial Exhibit 64*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibits 64, London Market Insurance Company Policy CU 8118/CL 98708, Definitions, "Occurrence."*

1969-1971

Excess London Market Insurance Company's Policies CU 10215 and CU 10216 (*Trial Exhibits 65 and 66*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibits 65 and 66*, London Market Insurance Company Policies CU 10215 and CU 10216, Definitions, "Occurrence."

1979-1980

Holland-America Insurance Company Policy H-88260's (*Trial Exhibit 34*) definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 34, Holland-America Insurance Company Policy 88260. Section II; parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Lexington Insurance Company Policy 5514993; *Trial Exhibit 50*

Highlands Insurance Company Policy SR 20792; *Trial Exhibit 24*

2nd Layer Excess:

Integrity Insurance Company Policy XL 200624; *Trial Exhibit 40*

Lexington Insurance Company Policy 5514992; *Trial Exhibit 49*

The American Insurance Company (Fireman's Fund) Policy XLX 1362292; *Trial Exhibit 20*

3rd Layer Excess:

London Market Insurance Company Policy 53930; *Trial Exhibit 69*

1980-1981

Holland-America Insurance Company Policy H-88300 (*Trial Exhibit 35*) Definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 35, Holland-America Insurance Company Policy H-88300, Section II, parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Lexington Insurance Company Policy 5521799; *Trial Exhibit 51*

Highlands Insurance Company Policy SR 21089; *Trial Exhibit 25*

2nd Layer Excess:

Integrity Insurance Company Policy XL 201746; *Trial Exhibit 41*

Highlands Insurance Company Policy SR 21090; *Trial Exhibit 26*

Lexington Insurance Company Policy 5521800; *Trial Exhibit 52*

3rd Layer Excess:

International Surplus Lines Insurance Company (ISLIC) Policy XSI 7030; *Trial Exhibit 45*

4th Layer Excess:

London Market Insurance Company Policy 54362; *Trial Exhibit 70*

1981-1982

Holland-America Insurance Company Policy H-93688 (*Trial Exhibit 36*) definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 36, Holland-America Insurance Company Policy H-88300, Section III, parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Highlands Insurance Company Policy SR 21279; *Trial Exhibit 27*

Lexington Insurance Company Policy 5522463; *Trial Exhibit 54*

2nd Layer Excess:

Highlands Insurance Company Policy SR 21280; *Trial Exhibit 28*

Lexington Insurance Company Policy 5522463; *Trial Exhibit 54*

Integrity Insurance Company Policy XL 203282; *Trial Exhibit 42*

3rd Layer Excess:

CNA Insurance Company Policy 4170236; *Trial Exhibit 12*

4th Layer Excess:

Federal Insurance Company policy 79357205; *Trial Exhibit 16*

1982-1984

Mission National Insurance Company Policy MN 009859 (*Trial Exhibit 71*) definition of occurrence:

> The term "Occurrence" whenever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing

from one premises location shall be deemed one occurrence. *Trial Exhibit 71.*

Mission National Insurance Company Policy MN 009859, Definitions, "Occurrence."

Following form policies which incorporate the aforementioned Mission National definition of occurrence:

1982-1983

1st Layer Excess:

National Union Insurance Company Policy 9600317, *Trial Exhibit 80*

Highlands Insurance Company Policy SR 21524, *Trial Exhibit 29*

2nd Layer Excess:

National Union Insurance Company Policy 9600316, *Trial Exhibit 79*

Highlands Insurance Company Policy SR 21525, *Trial Exhibit 30*

Integrity Insurance Company Policy XL 206329, *Trial Exhibit 43*

3rd Layer Excess:

Federal Insurance Company Policy (83)7935-72-05, *Trial Exhibit 17*

Transcontinental Insurance Company ("CNA") Policy RDX 009616553, *Trial Exhibit 89*

1983-1984

1st Layer Excess:

New England Insurance Company (Hartford) Policy 791331, *Trial Exhibit 82*

2nd Layer Excess:

Twin City Fire Insurance Company (Hartford) Policy TXS 102899, *Trial Exhibit 92*

3rd Layer Excess:

Highlands Insurance Company Policy 21833, *Trial Exhibit 31*

4th Layer Excess:

Federal Insurance Company Policy (84)7935-72-05, *Trial Exhibit 18*

Transcontinental Insurance Company ("CNA") Policy RDX 009616577, *Trial Exhibit 90*

1984-1985

Mission National Insurance Company Policy MN 034643 (*Trial Exhibit 72*) definition of occurrence:

> The term "Occurrence" whenever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing from one premises location shall be deemed one occurrence. *Trial Exhibit 72,*

Mission National Insurance Company Policy MN 03643, Definitions, "Occurrence."

Following form policies which incorporate the aforementioned Mission National definition of occurrence:

1st Layer Excess:

Integrity Insurance Company Policy XL 208532, *Trial Exhibit 44*

2nd Layer Excess:

Chicago Insurance Company Policy 255U-0037285, *Trial Exhibit 10*

Highlands Insurance Company Policy 22207, *Trial Exhibit 32*

3rd Layer Excess:

Federal Insurance Company Policy (85)7935-72-05, *Trial Exhibit 19*

Transcontinental Insurance Company ("CNA") Policy RDX 009616705, *Trial Exhibit 91*

Definition Group B

1972-1975

Appalachian Insurance Company Policy 71030 (*Trial Exhibit 9*), Lake Charles Coverage, definition of occurrence:

> With respect to [personal injury and property damage coverage] "occurrence" means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to persons or

> tangible property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence. *Trial Exhibit 9, Appalachian Insurance Company Policy 71030, Conditions, "Other Definitions," "Occurrence."*

Following form policies which incorporate the aforementioned Appalachian definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy D11366, *Trial Exhibit 88,* 1973-1973

1974-1975

Wausau Insurance Company Policy 225-0303-0862's (*Trial Exhibit 108*) definition of "occurrence:"

> "Occurrence" means an accident including continuous or repeated exposure to condition which results, during the policy period, in personal injury, property damage or advertizing injury neither expected nor intended from the standpoint of the insured. . . . All such personal injury, property damage or advertizing injury caused by one event or by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one occurrence . . . *Trial Exhibit 108. Wausau Insurance Company Policy 225-0303-0862, Definitions, "Occurrence."*

Following form policy which incorporates the aforementioned Wausau definition of occurrence into its own similar, but not inconsistent, definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy 12173; *Trial Exhibit 87,* See Definitions (a)."

1975-1976

Wausau Insurance company Policy 2226 00 030862 (*Trial Exhibit 109*) definition of "occurrence:"

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . *Trial Exhibit 109, Wausau Insurance Company Policy 2226 00 030862,*
>
> *Definitions, "Occurrence."*

Following form policy which incorporates the aforementioned Wausau definition of occurrence into its own similar, but not inconsistent, definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy 12173; *Trial Exhibit 87,* See "Definitions (a)."

1976-1977

Wausau Insurance Company Policy 2226 03 030862 (*Trial Exhibit 110*) definition of "occurrence:"

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured . . . *Trial Exhibit 110, Wausau Insurance Company Policy 2226 03 030862, Definitions, "Occurrence."*

Following form policies which incorporate the aforementioned Wausau definition of occurrence into its own definition of occurrence:

1st Layer Excess:

London Market Company Policy 53086, *Trial Exhibit 61*

2nd Layer Excess:

Lexington Insurance Company Policy GC 5503577, *Trial Exhibit 36*

Northbrook Insurance Company Policy 63001616, *Trial Exhibit 1*

American Home Assurance Company Policy CE 338 0697, *Trial Exhibit 4*

1977-1978

American Home Policy GLA 3432419 (*Trial Exhibit 5*) definition of "occurrence."

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. *Trial Exhibit 5, American Home Insurance Company Policy GLA 3432419, "Occurrence."*

Following form policies which incorporate aforementioned American Home definition of occurrence:

1st Layer Excess:

First State Insurance Company Policy 924273, *Trial Exhibit 21*

London Market Insurance Company Policy 53386, *Trial Exhibit 67*

2nd Layer Excess:

Lexington Insurance Company Policy 5502322, *Trial Exhibit 47*

National Union Fire Insurance Company Policy 1189498, *Trial Exhibit 73*

Northbrook Insurance Company Policy 63002718, *Trial Exhibit 2*

Home Insurance Company Policy HEC 9006863, *Trial Exhibit 37*

1978-1979

INSCO Insurance Company Policy CBC 1239 (*Trial Exhibit 39*) definition of "occurrence":

> With respect to Personal Injury and Property Damage, the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage during the policy period neither expected nor intended from the standpoint of the Insured. All Personal Injury or Property Damage arising out of the continuous or repeated exposure to substantially the same general condition shall be considered as arising out of one occurrence. *Trial Exhibit 39, INSCO Insurance Company Policy CBC 1239, Definitions, "Occurrence."*

Following form policies which incorporate aforementioned Wausau definition of occurrence:

1st Layer Excess:

Holland-America Insurance Company Policy H-84893, *Trial Exhibit 33*

2nd Layer Excess:

Highlands Insurance Company Policy SR 20550, *Trial Exhibit* 22

London Market Insurance Company Policy 53658/62739; *Trial Exhibit 68*

3rd Layer Excess:

Highlands Insurance Company Policy SR 20556, *Trial Exhibit* 23

Lexington Insurance Company Policy 5510568, *Trial Exhibit 48*

National Union Insurance Company Policy 1185472, *Trial Exhibit 74*

Northbrook (Allstate Insurance Company) Policy 630043032; *Trial Exhibit 3*

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 Honorable Judith C. Chirlin Department 89 STATEMENT OF DECISION AS TO PHASE IB, ISSUES 2-7 AND 9 Trial Date: September 10, 2001 (Filed Aug. 6, 2002)

I. INTRODUCTION

Fuller-Austin Insulation Company ("Fuller-Austin") brought this declaratory relief action to establish the obligations of defendant insurance companies, under various comprehensive general liability, umbrella and excess insurance policies issued between 1944 and 1985. The underlying claims allege bodily injury arising out of exposure to asbestos-containing products installed or removed by Fuller-Austin.

The original defendants were the solvent insurance companies that sold primary, umbrella and excess insurance policies to either Fuller-Austin or Dynalectron (later known as DynCorp). During the course of this action, Fuller-Austin settled its insurance disputes with all of its primary insurance companies and some of its umbrella and excess insurance companies, and dismissed these defendants from the action. There were no objections to the dismissals, and no cross-claims were filed by or among Joint Defendants. The remaining Joint Defendants are: The

American Insurance Company (Fireman's Fund Insurance Company), Chicago Insurance Company, Columbia Casualty Company, Federal Insurance Company, First State Insurance Company, Highlands Insurance Company, The Home Insurance Company, International Insurance Company, Certain Syndicates at Lloyd's, London and Certain Market Insurer Companies (collectively, "London Market"), New England Reinsurance Corporation, Stonewall Insurance Company, Twin City Insurance Company, and Transcontinental Insurance Company.

A. Order of Trial

The Court ordered that Phase I of the trial consist of nine legal issues for the Court's determination. Trial of legal Issues # 1-9 was first recommended by Judge Frederick Lower and adopted by the Court on December 1, 2000. As framed, these issues are either questions of law or interpretations of insurance contracts, and are properly tried to the Court. *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 (1965).

In December 2000, a bench trial – referred to by the parties as the Phase IA trial – was held on the following two issues:

Incorporation: The resolution of disputes concerning (a) the content of policies, and (b) the incorporation of lower level policy language into upper level policies, *i.e.*, what language in lower level policies is relevant and what language is to be incorporated.

Exhaustion: What method of exhaustion is appropriate in this case; exhaustion of immediately

underlying policies or exhaustion of all underlying insurance, in any years, *i.e.*, horizontal or vertical exhaustion?

On July 20, 2001, the Court issued its Statement of Decision on these two issues.[1] Following the close of Phase IA, the Court set trial on the remaining seven legal issues, designated Phase IB. Those seven issues are:

Issue No. 2 – "*Paid or Held Liable to Pay.*" What is the legal effect of policy language that requires the underlying carrier to "have paid or have been held legally liable to pay the full amount of their respective limits of liability" before an excess carrier's obligation arises.

(a) Is actual payment in cash, in full, or at all, required before an excess carrier's obligations are triggered?

(b) Does payment of underlying limits to the insured rather than to third party claimants constitute exhaustion?

(c) Does installment payments of underlying limits to the insured constitute exhaustion?

(d) Does an underlying insurer's assertion of exhaustion, contested by the insured, constitute exhaustion?

(e) Does an insured's assertion that its underlying coverage has been exhausted establish the fact of exhaustion binding upon its excess insurers?

[1] In a prior ruling, the Court determined that California law would apply to all of the insurance contracts except the London Market policies sold to Fuller-Austin with regard to the Cities Services facility. As to these Cities Services policies, the Court determined that Louisiana law would apply.

Issue No. 3 – *Excess Policy Triggers*. Are any of the parties at issue here triggered if Fuller-Austin's "liabilities" exceed the policies' attachment points?

(a) What "liabilities" are to be considered?

(b) Are there critical dates for determining "liabilities?" If so, what are those dates?

Issue No. 4 – *Trigger Dates*. Are there critical dates or events for determining if excess insurers' obligations have been triggered? If so, what are those dates?

Issue No. 5 – *Exhaustion As A Matter of Law*. Has exhaustion occurred as a matter of law because of the ruling in *Phoenix Ins. Co. v. U.S. Fire Ins. Co.*, 189 Cal.App.3d 1511, 235 Cal.Rptr. 185 (1987)?

Issue No. 6 – *"Drop Down."* What is the legal effect of "drop down" provisions in "excess" policies or in "umbrella" policies?

Issue No. 7 – *Impact of Insolvencies*. What is the legal effect of insolvencies of underlying insurers?

Issue No. 9 – *Trigger of Coverage*. Under California and/or Louisiana law do the Joint Defendants' policies respond on a "continuous trigger" basis?

The Phase IB trial commenced on September 10, 2001. Closing arguments were heard on December 11-12, 2001. Phase IB is the subject of this Statement of Decision.

B. Evidentiary and Procedural Stipulations Re: Phase IB

The parties entered into several stipulations, as follows:

Policy Stipulations: Trial Exhibits 1 through 110 are copies of the insurance policies at issue, including those sold by insolvent insurance companies that were not in the case and those sold by insurance companies who have settled. The parties stipulated that they would not object to the introduction at trial of Exhibits 1-110, the policies, all as are more fully listed in the Stipulation Regarding Insurance Policies signed by the parties during Phase IA.

The General of "First Wave" Document Stipulations # 1-4 were pretrial agreements wherein Fuller-Austin waived certain evidentiary objections to four categories of documents produced as a result of Joint Defendants' Motions to Compel filed in 1999. These four stipulations were signed by the parties during Phase IA and are part of the Court's files.

The "Third Wave" Document Stipulation was a pretrial agreement wherein the parties agreed solely for purposes of and use in Phase IB to waive certain evidentiary objections to thousands of documents produced in this matter. This stipulation was signed by the parties prior to commencement of the Phase IB trial and is part of the Court's files.

The Stipulation of Expected Testimony of Joszef Schwager was a pretrial agreement between Fuller-Austin and counsel for First State Insurance Company, New England Reinsurance Company and Twin City Insurance Company setting forth stipulated testimony of Joszef Schwager who was 2025(d)(6) designee for First State, New England Reinsurance and Twin City on the two topics set forth in the Notices of Deposition, dated February 4, 1999.

The Stipulation Re Conduct of Phase IB was a pretrial agreement between Fuller-Austin and Joint Defendants setting forth, among other things, that the continuous trigger for asbestos bodily injury insurance coverage set forth in *Armstrong World Industries v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 52 Cal.Rptr.2d 690 (1996) is controlling as to all of the insurance policies that are subject to California law.

The Stipulation Re Scope of Testimony of Elizabeth Warren was a pretrial agreement between Fuller-Austin and Joint Defendants setting forth, in general terms, the scope of the expected testimony from Plaintiff's Bankruptcy Expert, Professor Warren. The stipulation also reserved the parties' rights to object to testimony falling outside the scope of the agreed areas.

II. BANKRUPTCY OF FULLER-AUSTIN

While this case was in the pre-trial stages, on September 4, 1998, Fuller-Austin filed for bankruptcy protection in Delaware, under Section 524(g) of the Bankruptcy Code. On that date, Fuller-Austin submitted to the United States District Court, Honorable Joseph J. Farnan, (sitting in Bankruptcy) presiding, a "pre-packaged" bankruptcy plan ("Plan") pursuant to *11 U.S.C. § 524(g)*. Notice of the hearing on the confirmation of the Plan was given on or about September 16, 1998; various insurers filed objections to the Plan on October 9, 1998. The hearing on the confirmation of the Plan and a hearing on the issue of the insurers' standing to object was held on October 15, 1998. On November 10, 1998, the U.S. District Court held that the objecting insurers had no pecuniary interest in the Plan and, accordingly, the insurers did not have

standing to object to the Plan.[2] *See Trial Exhibit 544 – Order re: Standing of Insurers.* On November 13, 1998, the U.S. District Court issued its Order Confirming the Plan[3] and, consequently, on December 11, 1998, the Fuller-Austin Settlement Trust ("Trust" or "FAST") became effective. *See 11 U.S.C. § 524(g)(2)(B).*

Throughout the pretrial proceedings after November 13, 1998, and in this trial, the parties vigorously disputed the nature of the bankruptcy proceedings and the orders entered by Judge Farnan as well as their effect on this case. Plaintiff contends that the Order Confirming the Plan established Fuller-Austin's liabilities to the asbestos claimants. It further contends that the Plan as proposed by it contained the aggregate value of pending and future claims, but upon objection of the Joint Defendants, the aggregate value provision was removed from the Plan, leaving such determination to be made in this litigation under California law. The Defendants claim that in denying standing to them, Judge Farnan repeatedly assured them that nothing he did in the bankruptcy case would affect their right to litigate the coverage issues. Thus they argue that the bankruptcy proceedings and the order have no effect on them.[4]

---

[2] No insurance company appealed this decision

[3] The bankruptcy court must make thirteen specific, independent findings before confirming a proposed plan. *See 11 U.S.C. § 112(A).* Such findings including that the proposed plan: is in good faith, conforms to the bankruptcy code, and is feasible. The bankruptcy courts findings are binding on the debtor and all claimants against the estate (both as to the liability of the debtor or non-liability and the dollar amount fixed). *See Warren Trial Testimony, September 14, 2001, p. 48-49.*

[4] Defendant Insurers also cite the decision of the California Supreme Court in *Certain Underwriters at Lloyd's of London v. Superior*

(Continued on following page)

Each side called a witness with bankruptcy expertise.[5] Plaintiff called Professor Elizabeth Warren of the Harvard Law School; Defendants called Judge Herbert Katz, a retired Bankruptcy Judge. In what turned out to be largely tutorials, the experts discussed bankruptcy law in general and *11 U.S.C. § 524(g)*, the legislative history and the purposes thereof, in particular. They also discussed their views as to whether or not the Fuller-Austin Bankruptcy Plan met the legislative criteria set out in § 524(g).[6]

Court ("Powerine"). 24 Cal. 4th 945 (2001), wherein the Court held that " . . . the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' is limited to money ordered by a court." They argue in essence that Fuller-Austin's obligations under the Bankruptcy Plan, even though entered by order of a United States District Court with extensive findings as required under the Bankruptcy Code, are not "damages[,] . . . money ordered by a court." Rather, they argue that the fact that the Plan was "prepackaged" means that it was a settlement to which they did not agree, and therefore, under *Powerine*, they have no duty to indemnify Fuller-Austin for any liabilities dealt with by the Bankruptcy Plan. For reasons set forth *infra*, this Court rejects that argument.

[5] During the pretrial proceedings, the Court and counsel discussed whether or not it was appropriate to call Bankruptcy "experts" *per se*, as the determinations to be made were primarily legal in nature and thus the province of the Court. The Court permitted, indeed encouraged, the parties to call the witnesses, with the observation that if some of their testimony ultimately proved to be inadmissable legal conclusions, the rest would be considered as a "tutorial" on a subject with which the Court has had limited experience.

[6] As testified to by Professor Warren and confirmed by Judge Katz, § 524(g) was enacted to deal with unique bankruptcy related problems in the context of asbestos mass tort litigation. Traditional bankruptcy concepts require, simplistically stated, that the debts of a bankrupt be listed and the assets marshaled. Then the assets are divided up pro-rata among the creditors or classes of creditors, in a fashion consistent with legislatively established priorities, the goals of which are to equalize asset distribution among similarly situated creditors. That procedure obviously contemplates that creditors be identified either

(Continued on following page)

Based on the evidence presented, the law and the arguments of counsel, the Court concludes that the confirmed Bankruptcy Plan ("Plan") served to establish Fuller-Austin's liability for asbestos-related injuries, the quantum of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability. *11 U.S.C. § 524(g)*. Fuller-Austin's "prepackaged" Plan was brought and confirmed under *11 U.S.C. § 524(g)*. Bankruptcy section, *11 U.S.C. § 524(g)*, was specifically drafted and designed to deal with *pending and future* claims in mass asbestos tort cases.[7] *11 U.S.C. § 524(g)(2)(B)(i)(I) and (II)*; *also see Warren Trial Testimony, September 14, pp. 72-74*. Section 524(g), in conjunction with other bankruptcy provisions, provides framework for (i) resolving all present and future liabilities of a debtor, (ii) establishing the amount of the debtor's liability and the value of each claimant's claim in lawful

---

before or during the pendency of the bankruptcy proceedings. In the context of asbestos, that is not possible due to the latency period between exposure to asbestos and the manifestation of its ill effects. In the case of mesothelioma, for example, it is recognized that the latency period can be as much as 40 years. As such, people exposed to asbestos in 1980 may not suffer any effects from it until 2020. Thus, if all assets of a bankrupt are marshaled and distributed in 2000, the mesothelioma sufferer whose illness does not manifest itself until 2020 receives nothing, while a person similarly situated whose disease manifested itself in 1995 receives a recovery. One of the purposes of 524(g) was to establish a procedure that would enhance the likelihood that future claimants (people already exposed, but whose illness has not yet manifested itself) would be treated equally with present claimants. This is precisely the problem that confronted Fuller-Austin.

[7] As stated by Professor Elizabeth Warren, *11 U.S.C. § 524(g)* was intended to "level the playing field" between pending and future claimants by assessing the same monetary value for present and future claims, and thus, assuring that funds will be available for future claimants.

U.S. currency, (iii) protecting present claims and future contingent claims and demands by appointing separate legal representatives for the present and future claimants, (iv) setting up a trust to pay all present and future asbestos claims and demands in a like manner, and, (v) creating an injunction barring any further legal action with respect to the asbestos claims and demands resolved in bankruptcy. *11 U.S.C. § 524(g).*

As part of the reorganization process under *11 U.S.C. § 524(g)*, Fuller-Austin Settlement Trust (the "Trust") was established. Pursuant to applicable statutory language, the Trust assumed the liabilities (pending and future claims for asbestos-related injuries) of Fuller-Austin and Dyncorp at the time of the entry of the order for relief and, among other mandates, is required to use its assets to pay claims and demands. *11 U.S.C. § 524(g)(2)(B)(i)(I) and (IV).* Based upon the Plan, the Trust is structured to operate through mechanisms (*e.g.* matrices) which are designed to provide reasonable assurances that the Trust will be in a financial position to pay present claims and future demands that involve similar claims in substantially the same manner. *11 U.S.C. § 524(g)(2)(B)(ii)(V); see Warren Trial Testimony, September 14, 2001, p. 81.*[8]

Fuller-Austin's legal obligations to the asbestos claimants and the insurance companies' contractual

[8] Defendants argue that the Trust's claims procedures – which are considerably less cumbersome than traditional claims procedures or than litigation – results in the possibility of payments without legally sufficient proof of the claims. But the very purpose of such a trust is to "minimize the amount of money paid on distribution, the administrative part, the overhead part, and to maximize the amount that can be put in the hands of the actual victims." *Warren Trial Testimony, September 14, 2001, p. 82.*

obligations to Fuller-Austin were not diminished solely because of Fuller-Austin's bankruptcy. *California Insurance Code § 11580; Webster v. Sup. Court*, 46 Cal.3d 338, 347-48 (1988). All the insurance policies in effect provide that the "bankruptcy" of the insured shall not affect the insuring obligations. For example, each policy contains the following provision:

> In the event of the bankruptcy or insolvency of the Insured, the Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.[9]

Once the Plan was confirmed, Fuller-Austin became legally obligated to pay all pending and future asbestos claimants.

Consequently, now that Fuller-Austin's liability has been established, Joint Defendants policies are implicated and they are required to pay "all sums" for each allowed claim – the allowed liquidated value or some higher value established through arbitration or trial, subject to the terms of the policies. Additionally, Joint Defendants are required to pay the aggregate value of Fuller-Austin's asbestos liability to the extent that these damages can be ascertained.[10] Whether the amount of these pending and

---

[9] Such language is required in all policies pursuant to *Ins. Code § 11580.*

[10] This concept should not come as a surprise to Joint Defendants since estimating the aggregate value of pending and future claims is provided for under *§ 524(g)*. Defendants' reliance on the language in §524(g) that "the actual amounts, numbers and timing of . . . future demands cannot be determined" is not inconsistent with the estimation process. Section §524(g)(2)(B)(ii)(V) specifically provides for the "estimates of the numbers and values of present claims and future demands," and such an estimation is also required under §502(c).

(Continued on following page)

future claims can be calculated with reasonable certainty is an issue for the jury in the next trial phase.

III. ISSUE # 9 – TRIGGER OF COVERAGE

A. Overview of Dispute

The parties have stipulated that as to those insurance policies subject to California law (all policies except for the Cities Services policies issued by London Market) the continuous trigger of coverage for asbestos bodily injury claims set forth in *Armstrong World Industries v. Aetna Cas. & Sur. Co.*, 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996) is controlling. As to the Cities Services policies subject to Louisiana law, Fuller-Austin contends that Louisiana law allows for the application of the continuous trigger where it will maximize coverage. *Cole v. Celotex Corp.*, 599 So.2d 1058, 1077, 1086 (La. 1992). The London Market defendants, on the other hand, contend that *Cole* mandates an exposure trigger.

Only two defendants, Columbia Casualty Company and Transcontinental Insurance Company (collectively, "CNA"), contend that their policies respond only to injuries that incept during a policy period pursuant to the language contained in the Endorsement No. 7. CNA insists that under Endorsement No. 7, only losses due to injury or

---

Courts have recognized the ability to make such estimations accurately. *In re Johns-Manville Corp.*, 830 F.Supp. 686 (S.D.N.Y. 1993); *In re Eagle Picher*, 189 B.R. 681 (1995). As set forth above, Joint Defendants objected to the aggregate value provisions contained with the Plan. As a result, Fuller-Austin withdrew the aggregate value provisions in order for such a determination be made under California law. This determination will be made in Phase II.

destruction occurring after the inception date of the policy and not before, apply to reduce the underlying limits.

Yet Fuller-Austin argues the Endorsement No. 7 provision is designed to ensure that if CNA's policy is non-concurrent with the underlying policy, the injuries or damages that exhaust the underlying policy must also fall within CNA's policy. Under the continuous trigger, and based on the fact that all of the underlying CNA policies were concurrent at the time the policies were sold, Fuller-Austin maintains that the underlying policies necessarily provide coverage that would fall within the time parameters of the CNA policy. Additionally, Fuller-Austin specifically notes that the Court ruled, on summary judgment, that CNA's Endorsement No. 7 provision (and related provisions) was ambiguous. *See Order Denying CNA's Motion for Summary Adjudication of Issues Re No Present Duty to Indemnify dated December 22, 1999.*

The Cities Services policies issued by London Market cover a specific location. Fuller-Austin contends that, to the extent these policies are triggered by Cities Services asbestos claims, the policies respond in full and London Market has no rights to "other insurance." This position is referred to as the "specific versus general" argument. London Market disputes Fuller-Austin's position.

B. Overview of Trigger of Coverage

The continuous trigger of coverage for progressive injury and damage claims was adopted by the California Supreme Court in *Montrose Chemical Corp. of Calif. v. Admiral Ins. Co.*, 10 Cal.4th 645, 689, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1985), which held that "where . . . successive CGL policy periods are implicated, bodily injury and

property damage which is continuous or progressively deteriorating through several policy periods is potentially covered by all policies in effect during those periods." *See also*, Croskey, Kaufman, *et al.*, CAL. PRAC. GUIDE: INSURANCE LITIGATION (The Rutter Group 2000) ("Cal.Prac.Guide"), ¶ 7:175. The continuous trigger has been applied consistently in dealing with progressive injury cases, such as asbestos. In *Armstrong*, the First District Court of Appeal applied the "continuous trigger" of coverage to asbestos bodily injury claims similar to the ones presented here, holding:

> It bears emphasizing that whether there is coverage for 'bodily injury' is not the question here; it is undisputed that the CGL policies provide coverage for the asbestos-related injuries suffered by the claimants. The question before this court is when the injuries occurred. . . . [T]he trial court's factual findings here, made after consideration of extensive medical testimony, amply support the conclusion that injury actually occurs upon exposure and continues until death. We therefore find *no error* in the trial court's adoption of a continuous trigger. (See also *Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d 1178, 1196-1197; *Owens-Illinois, Inc. v. United Ins. Co.* (1994) 138 N.J. 437 [650 A.2d 974, 955]; *J.H. France Refractories v. Allstate* (1993) 534 Pa. 29, A.2d 502, 506-507].)

Armstrong, 45 Cal.App.4th at 47, 52 Cal.Rptr.2d 690.

The continuous trigger is based, in part, on the "all sums" language (or its "ultimate net loss" equivalent) found in general liability policies. This language obligates "the insurers to pay on behalf of a policyholder 'all sums' that the policyholder becomes legally obligated to pay as

damages because of bodily injury during the policy period," and consistently has been interpreted to preclude requiring the policyholder to pay for periods where the policyholder is uninsured or insurance coverage is unavailable. *Armstrong*, 45 Cal.App.4th at 57, 52 Cal.Rptr.2d 690. ("It is irrelevant that only part of the asbestos-related disease developed during any single policy period or during a period in which the manufacturer had no insurance. The logical consequence of this ruling is that the policyholder is covered (up to the policy limits) for the full extent of its liability and need not pay a pro rata share.").

The Supreme Court of Louisiana adopted an "exposure" trigger of coverage in an asbestos insurance coverage case. *Cole*, 599 So.2d at 1086. Under the exposure trigger, the policies in effect during the period in which a claimant was exposed are triggered. It should be noted that in the concurring opinion issued in that case, one justice opined that the Court did not consider the continuous trigger because under the facts of the case it would not have made any substantive difference. The concurring opinion went on to note that in order to fulfill Louisiana's guiding principle of maximizing coverage, the continuous trigger could be applied in a future case. The Court is aware of no Louisiana case either adopting or rejecting the possible application of the continuous trigger.

C. Court's Ruling on Trigger of Coverage

The Court concludes that the continuous trigger should apply to all of the insurance policies, including those sold by the London Market for the Cities Services site and those sold by CNA containing the Endorsement No. 7 language.

As to the London Market Cities Services policies, the Court determines that a continuous trigger will fulfill Louisiana's stated policy of maximizing insurance coverage under the circumstances presented by Fuller-Austin. Additionally, the Court finds that Cities Services policies are "specific policies" and that they must respond immediately to Cities Services asbestos claims, and are not entitled to the benefit of "other insurance" provided by general policies covering the same claims. Under Louisiana law, a policy covering a specific risk is considered primary to a policy covering general risks. *Fasullo v. American Druggists' Insurance*, 262 So.2d 810 (La. 1972). Where both a specific and general policy cover the same risk, the "rule appears to be that the 'specific' policy must bear the entire loss up to its policy limits; the 'general' or 'blanket' policy is treated as excess insurance so that its coverage does not attach until the 'specific' insurance has been exhausted." *Id.*, at 815. As the *Fasullo* court held:

> the specific policy must bear the entire loss on the portion of the premises which it covers up to its face amount, with the blanket policy or policies affording residual or excess coverage to the extent of their respective limits of liability. *Id.*, at p. 815; *see also*, 16 Couch on Insurance (2d) 507 Sec. 62:59.

This specific-over-general rule has particular application to the Cities Services policies, which are specific to a particular location. Applying Louisiana law, these specific policies respond to a loss arising out of Cities Services before any other Fuller-Austin general policies.

As for CNA, the inception trigger that CNA advances is not supported by the policy language, the case law, or the continuous trigger approach to progressive injury

cases. Furthermore, the Court previously has ruled that the Endorsement No. 7 language (and similar such language found in other CNA policies) is ambiguous. The Court finds that the interpretation given by Fuller-Austin is reasonable and, therefore, adopts Fuller-Austin's interpretation. *Safeco Ins. Co. v. Robert S.*, 26 Cal.4th 758, 763, 110 Cal.Rptr.2d 844, 28 P.3d 889 (2001) ("ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations"). Fuller-Austin's interpretation is reasonable under the circumstances and is consistent with the testimony provided by CNA's witnesses, Pamela Gillette and Dean Theos, and CNA's own internal documentation, which referred to this provision as a non-currency provision with limited application. Trial Exh. 1869 ("Instructions for Use: This endorsement is mandatory and is designed to restrict the coverage contained in the policy form when there is a non-currency situation.").

Accordingly, consistent with the holdings in *Montrose* and *Armstrong*, the Court will adopt the continuous trigger, as follows:

1. All of Fuller-Austin's policies that were in effect from the date of first exposure to any asbestos or asbestos-containing product until the date of death or claim, whichever occurs first, are triggered with respect to an asbestos bodily injury claim. This trigger applies regardless of the nature of the asbestos-related injury or disease alleged by a claimant.

2. Each triggered policy has an independent obligation to pay in full up to policy limits any indemnity costs on an asbestos bodily injury claim and, if the policy contains a defense obligation, to pay in full any defense costs

on the claim. Fuller-Austin is not required to share in the indemnity or defense costs of a claim based upon any uninsured or self-insured periods of time.

3. With respect to the London Market Cities Services policies, the policies are "specific policies" that they must respond first to Cities Services asbestos claims, and are not entitled to the benefit of "other insurance" provided by general policies covering the same claims.

III. ISSUE NO. 7 – IMPACT OF INSOLVENCIES

A. Overview of Dispute

The parties dispute the impact of insolvent insurance companies in the Fuller-Austin program. Fuller-Austin's position is that asbestos losses are not allocable to insolvent policies pursuant to "other insurance" provisions. Fuller-Austin notes that the term "other insurance" is separate and distinct from the term "underlying insurance," as these terms are used in the insurance policies. Since insolvent insurance is uncollectible, it is not factored into the amount of available "other insurance."

In some aspects, Joint Defendants agree with Fuller-Austin. The Joint Defendants acknowledge that, where there are both solvent and insolvent insurance policies at the same layer of coverage in the Fuller-Austin program, there can be no allocation of an asbestos loss to the insolvent period. Tr. Trans., Sept. 13, 2001 at 413-14. Joint Defendants, however, contend that insurance companies sitting above a layer containing insolvent coverage are entitled to the benefit of that insolvent coverage. Joint Defendants argue that all insurance in a layer beneath an insurance company – even insurance issued for a different

policy period – is "underlying insurance," not "other insurance."

B. Relevant Policy Language

The remaining policies in this action contain or incorporate an "other insurance" provision which is typically defined as follows:

> If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be excess of, and shall not contribute with such other insurance. Excess insurance over the Limits of Liability expressed in this policy is permitted without prejudice to this insurance and the existence of such insurance shall not reduce any liability under this policy. Trial Exhs. 1-5, 9-37, 39-54, 56-62, 64-110.

The remaining insurance policies also define "underlying insurance" typically as follows: "UNDERLYING INSURANCE meaning all policies scheduled in Item [] of the Declarations." Trial Exh. 1-5, 9-37, 39-54, 56-62, 64-110.

C. Ruling on Effect of Insolvencies

The distinction between "other insurance" and "underlying insurance" is useful in determining the effect of insolvent policies. "Other insurance" provisions define "other insurance" as other "valid and collectible insurance" that is available on the *same layer* of coverage as the subject policy. *See, e.g.*, Cal.Prac. Guide, ¶¶ 8:11-12, 8:24.5; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal.App.4th, 847, 899 (2000); *Span Inc.*

v. Associated Int'l Ins. Co., 227 Cal.App.3d 463, 480 (1991) (quoting *U.S. Fire Ins. v. Capital Ford Tr. Sales*, 355 S.E.2d 428, 433 (1987) "it [the policy] repeatedly states that other insurance must be collectible, but does not so state with respect to the underlying insurance . . . "); *McConnell v. Underwriters at Lloyd's of London*, 56 Cal.2d 637 (1961) (distinction between "other insurance" and "underlying insurance"). Louisiana law, likewise defines "other insurance" as collectible. *Kelly v. Weil*, 563 So.2d 221 (La. 1990). Insolvent coverage cannot be collectible insurance. *Hellman v. Great Am. Ins. Co.*, 66 Cal.App.3d 298 (1977); Cal.Prac. Guide, ¶ 8:24.5. Consequently, insolvent insurance cannot be calculated into any given layer to determine the amount of coverage available before any excess insurance policy is triggered.

For purposes of determining stated attachment points, the relevant inquiry is the policy language specifying "underlying insurance," which identifies the amount of insurance that sits directly beneath an excess insurance policy in any given policy year. In contrast to "other insurance," "underlying insurance," which is also defined within all applicable policies, sets the minimum attachment point that must be reached before that specific policy must respond. "Underlying insurance" refers only to the insurance identified in a specific policy as being specifically under that excess policy. *See, e.g.*, Cal.Prac. Guide, ¶¶ 8:11-12, 8:24.5; *Shade*, 78 Cal.App.4th at p. 899. Accordingly, by definition, "underlying insurance" cannot include insurance policies issued in other policy periods. Joint Defendants' attempt to expand the definition of "underlying insurance" to embrace all policies at lower levels or layers of coverage in *all* years does not comport with the language of the

policies and is inconsistent with the case law. Which consistently distinguishes "underlying insurance" from "other insurance." *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal.4th 38, 75 (1997).

Accordingly, the Court rules as follows:

1. Insolvent insurance policies are not "other insurance" for purposes of apportioning loss over multiple policy periods.

2. Where solvent policies and insolvent policies are triggered at the same layer of coverage, Fuller-Austin will not be required to contribute to an asbestos loss as a result of the insolvent policy periods.

3. An excess insurance company cannot apportion any loss to an insolvent period at a lower level of coverage. Rather, an excess insurance policy responds once the loss exceeds the available solvent coverage at lower layers.

IV. ISSUE NO. 6 – LEGAL EFFECT OF "DROP DOWN" PROVISIONS

A. Overview of Dispute

The parties dispute the application and relevance of the concept of "drop down." Fuller-Austin submits that it is not seeking to have any of the insurance companies "drop down" below their stated attachment points and fill a gap caused by the insolvency of an underlying insurance company. Where as Joint Defendants' position is that Fuller-Austin is seeking to have its insurance companies "drop down" and fill gaps caused by insolvent coverage. Further, Defendant Highlands contends that "cease to apply" language in certain of Highlands' policies requires that its excess policies provide no coverage where an

underlying insurance company becomes insolvent; and defendant Transcontinental contends that, to the extent that Highlands policies provide no coverage as a result of "cease to apply" language, the Transcontinental policies also "cease to apply."

B. Overview of "Drop Down" Concept

A Louisiana court defined "drop down" as

> the minimum threshold of the excess insurance company's obligation is lowered in order to cover the gap in coverage resultant from the primary insurance company's insolvency. Drop down coverage 'occurs when an insurance carrier of a higher level of coverage is obligated to provide the coverage that the carrier of the immediately underlying level of coverage has agreed to provide.

Louisiana Insurance Guaranty Assoc. v. Interstate Fire & Cas. Co., 630 So.2d 759, 761 fn. 1 (1994) (citations omitted). The minimum threshold referred to above is the attachment point set forth in the policies limits of liability and underlying insurance provisions. For example, a policy that provides $5,000,000 excess of $1,000,000 has a stated attachment point of $1,000,000. Drop down would occur when that excess insurance company is asked to pay a loss that is less than the $1,000,000 stated attachment point.

C. Court's Ruling on Drop Down

The Court finds no argument by Fuller-Austin that it was seeking to have any insurance company drop down and respond below their stated attachment point. Consequently,

the Court finds that, in accordance with its rulings on horizontal exhaustion/allocation and the impact of insolvencies, no excess insurance company is being required to "drop down," below its stated attachment point.

As to the "cease to apply" argument addressed by certain Defendants, the Court rules that the insolvency of an underlying insurance company does not relieve the excess insurance company of its obligations. The "cease to apply" provision is a following form clause designed to incorporate changes in insurance coverage from the underlying insurance policy into the excess insurance policy.[11] Here, the insolvency of an insurance company does not change the terms of the insolvent insurance policy, nor does it constitute a cancellation or termination of insurance coverage. It is not a situation where the following form provision has any application whatsoever.[12] At a minimum, the "cease to apply" language is ambiguous in the context of continuous injury claims and therefore must be construed in favor of coverage. *Safeco*, 26 Cal.4th at 763.

---

[11] On this issue, the only cases provided to the Court by the parties, although not California authorities, support the court's findings. *Metropolitan Leasing Inc. v. Pacific Employers Ins. Co.*, 36 Mass.App.Ct. 536, 633 N.E.2d 434, 438 and fn. 4 (Mass. 1994); *Highlands Ins. Co. v. Gerber Products Co.*, 702 F.Supp. 109 (D.Md. 1988).

[12] For example, the *Highlands* case held that the excess insurance company still had an obligation to pay that portion of the liability in excess of the insolvent policy, but found that the liability did not exceed the stated limits of the insolvent policy.

Accordingly, the Court rules, as follows:

1. No excess insurance company is being required to respond to an asbestos loss below its stated attachment points.

2. No defendant is entitled to a credit for any insolvent coverage on a layer beneath or at the same level as its policy. Applying the ruling on the insolvency issue set forth above, the Court finds that the covered loss should be allocated to solvent unexhausted and unsettled policies on a layer by layer basis with no credit being afforded to any insurance company as a result of the insolvent coverage.

3. The "cease to apply" language does not impair, impact, or otherwise affect an insurance policy that sits above an insolvent insurance policy.

V. ISSUE # 2 – PAID OR HELD LIABLE TO PAY

A. Overview of Dispute

The parties dispute the interpretation and effect of the "paid or held liable to pay" language contained or incorporated into the Joint Defendants' insurance policies. Fuller-Austin's position is that the "paid or held liable to pay" language establishes that the policies are "liability" insurance policies, which obligate the Joint Defendants to pay once Fuller-Austin has been held liable in an amount that exceeds the stated attachment points of any given policy, irrespective of whether an underlying insurance company has paid its limit or anything at all.

In contrast, Joint Defendants' primary position is that no response is required until the underlying insurance companies have actually paid their full limits in indemnity

for covered asbestos liabilities directly to claimants. Joint Defendants further contend that payment of anything less than full policy limits does not constitute exhaustion.[13]

B. Overview of "Paid or Held Liable to Pay" Language

The "paid or held liable to pay" language typically is found in the limits of liability section of the insuring agreements.[14] There are other provisions typically found in the excess insurance policies that pertain to triggering of the insurance companies obligation to pay. In particular, the "ultimate net loss" clauses in the policies in this action are typically defined to "mean the total sum which the Assured, or any Company as his insurer, or both become obligated to pay by reason of personal injury, property damage or advertising liability claims." The "loss payable" provision provides a mechanism for making a claim against the insurance company either after the policyholder has paid or after the policyholder's liability has been fixed by judgment or settlement. Finally, the "maintenance of underlying insurance provision" makes clear that if an underlying insurance policy is not maintained in

[13] Joint Defendants now concede that the "paid or held liable to pay" language may be interpreted to trigger the Joint Defendants' insuring obligations where the liability exceeds the stated attachment points of the remaining umbrella and excess insurance policies. *See* Joint Insurers' Phase IB Trial brief, at p. 14. However, Joint Defendants have set forth certain criteria as to what constitutes a liability and assert that there currently is no liability that triggers their insuring obligations.

[14] In its Phase IA rulings, the Court found that the insurance policies in this action either contain or incorporate the "paid or held liable to pay" language or equivalent language.

full, the umbrella or excess insurance company is still liable in the same manner had the underlying insurance policy been maintained.

C. Court's Ruling on "Paid or Held Liable to Pay"

The excess insurance companies' policies provide coverage to the policyholder for losses (or "ultimate net loss") and define "loss" as sums paid or "payable." By using the word "payable" and not just "paid," the excess insurance policies clearly contemplate coverage for liabilities and amounts not yet paid. The insurance policies indicate that the excess insurance companies' obligation to pay arises upon the policyholder's liability – not upon the policyholder's payment of the liabilities. In other words, the remaining policies in this action are liability insurance policies, not indemnity policies.[15]

As such, the insurance companies' obligations to pay are triggered by Fuller-Austin's legal obligation to pay losses that exceed the excess insurance companies' stated attachment points, subject to "other insurance" principles discussed above. This holding is consistent with the language found in other clauses in the policy, including the "ultimate net loss" provision, which predicates the insurance companies' liability on the policyholder's "obligation" to pay, and not actual payment. Likewise, the "maintenance of underlying insurance" reinforces the proposition that even if the underlying insurance company

[15] As a result of Fuller-Austin's bankruptcy all of its remaining insurance policies are deemed liability insurance policies. *Haisten v. Grass Valley Reimbursement Fund. Ltd.*, 784 F.2d 1392, 1403 (9th Cir. 1986)

does not pay, whether it is because it is insolvent or otherwise, the excess insurance company's obligation will still arise.

California case law supports the Court's conclusion that "paid or held liable to pay" means that an insurance company is liable for, and its obligation to pay is triggered by, that portion of a liability that exceeds its attachment point, irrespective of whether the policyholder or the underlying insurance company has paid the underlying limits or anything at all. *See Span*, 227 Cal.App.3d at 480; *Denny's, Inc. v. Chicago Ins. Co.*, 234 Cal.App.3d 1786 (1991); *The Vons Companies, Inc. v. United Stats Fire Insurance Company*, 78 Cal.App.4th 52 (2000). Louisiana law is in accord. *Gasquet v. Commercial Union Ins. Co.*, 391 So.2d 466 (La.1980) (settlement with underlying insurance company for less than policy limits does not relieve excess insurance company from obligations); *Futch v. Fidelity & Casualty Company*, 246 La. 688 (1964); *Benroth v. Continental Casualty Co.*, 132 F.Supp. 270 (W.D.La.1955). Other jurisdictions, likewise, have held that an excess insurance company's obligations are triggered by the value of the liability and not by payment. *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665 (2d Cir.1928 (Augustus Hand, J.)) (No need for payment of cash in full to trigger excess policy. Excess insurance company merely entitled credit if underlying insurance settled for less than policy limits.); *Rummel v. Lexington Insurance Co.*, 123 N.M. 752, 948 P.2d 970 (N.M.1997); *Insurance Co. of North American v. Kayser-Roth*, 770 A.2d 403 (R.I.2001).

In turn, a liability may be established by an adjudication, a judgment, or by a reasonable settlement. In the context of these liability policies, Fuller-Austin's legal

obligation was established at the time that the bankruptcy court entered judgment against Fuller-Austin, thus fixing Fuller-Austin's liability for all present and future asbestos claims. 1 Windt, Insurance Claims & Disputes § 6.05 p. 384 (3d ed. 1995) ("If the policy provides liability insurance, the insurer becomes liable immediately on the entry of judgment against the insured."). The aggregate value of that liability will be determined in the next phase, Phase II, by a jury pursuant to judicially recognized methodologies. *E.g.*, *In re Eagle-Picher*, 189 B.R. 681 (1995).

Joint Defendants concede that actual payment is not necessary, instead acknowledging that a liability in excess of their attachment points can trigger their obligations. *See* Joint Insurers' Phase IB Trial Brief, at p. 14 ("An excess policy may be implicated if an insured's present covered liability exceeds all underlying insurance."). Yet, a requirement that a policyholder would have to show "exhaustion by payment" would render this concession meaningless unless "exhaustion" can be shown by demonstrating a liability in excess of the attachment point. Exhaustion is not a defined term, either in the policies or the case law. Exhaustion has been used by courts in different factual scenarios to describe different events. The case law makes clear that the term "exhaustion" is different depending on the factual scenario presented.

For example, in the context of transferring the duty to defend, the case law describes exhaustion as requiring payment by the underlying insurance company of judgments or settlements. *See, e.g., Community Redevelopment of the City of Los Angeles v. Aetna Casualty & Surety Co.*, 50 Cal.App.4th 329 (1996). However, in the context of a legal obligation to pay, the case law describes exhaustion by reference to allocation of the loss to a given layer of

coverage (depending on the method of allocation adopted by the court) and whether that layer has sufficient limits to cover the loss. *See, e.g., Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593 (1981). Where the lowest level of coverage provides sufficient limits of available insurance to cover a loss in its entirety, that coverage is not exhausted for purposes of triggering a higher level excess insurance policy. However, where available insurance in a lower layer of coverage is not sufficient to cover the loss in its entirety, an excess insurance company is responsible for that portion of the loss that exceeds its stated attachment point – regardless of whether the underlying insurance company has paid or can pay an underlying judgment or settlement. *See, e.g., Span*, 227 Cal.App.3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52. In other words, underlying coverage is exhausted when a loss exceeds the available underlying insurance.

Joint Defendants' reliance on duty to defend cases is readily distinguishable from the question posed here. *See*, Joint Insurers' Phase IB Trial Brief, at p. 12. The duty to defend is a separate and independent obligation that requires a primary insurance company to pay defense costs that have no impact on the policy limits available to pay the policyholder's actual liability. The exhaustion discussed in cases focusing on the transfer of the duty to defend is separate and distinct from the triggering event necessary to trigger an insurance company's obligation to pay.[16] In those cases [*Olympic*, 126 Cal.App.3d 593;

---

[16] Likewise, the cases discussing the need for exhaustion before the excess insurance company will have an obligation to pay a policyholder's legal obligation [*e.g., Olympic*, 126 Cal.App.3d 593, 178

(Continued on following page)

Stonewall, 46 Cal.App.4th 1810] relied upon by Joint Defendants where the excess insurance company was found to have no obligation to pay, the liability did not exceed the amount of solvent insurance coverage underlying the excess insurance policy, a factual situation that is not presented here.[17] Louisiana law is in accord. *Kelly*, 563 So.2d at 226 ("There can be no liability imposed on U.S. Fire except for damages which might be awarded plaintiff in excess of the $1,000,000 underlying limits.") Accordingly, the focus is not on proof of exhaustion by payment, but on proof of the amount of the covered liability.[18] *Span*, 227 Cal.App. 3d at 468 (concluding that excess insurance company had no duty to "drop down" and "provide first dollar coverage upon the insolvency of Union," but that

---

Cal.Rptr. 908; *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 54 Cal.Rptr.2d 176 (1996)] involved factual situations where the total amount of the fixed liability was less than the amount of insurance provided by all of the solvent primary insurance. These cases focused on allocation, and not exhaustion by payment. Under the facts in those cases, there was no need to allocate any of the loss to the excess insurance companies. Here, Fuller-Austin contends that the dollar amount of its legal obligation prior to bankruptcy and as a result of the bankruptcy judgment is in excess of the primary coverage.

[17] The aggregate amount of Fuller-Austin's covered legal obligation is a question of fact reserved for the jury phase of this action, to be determined in accord with the legal principles set forth herein.

[18] It should be noted that irrespective of the relevancy of actual exhaustion, Fuller-Austin contends that all of the primary insurance has been exhausted both by payment of judgments or settlements. In addition to producing documents from the primary insurance companies demonstrating payments, Fuller-Austin has also submitted depositions and declarations from all three primary insurance companies stating that their primary policies were exhausted by payment. Trial Exhs. 879, 880, 881. Assuming that exhaustion was a relevant inquiry, the Court finds that Fuller-Austin has met its burden in demonstrating such exhaustion.

excess insurance company remained liable "for that portion of the underlying judgment in excess of the Union policy limits"); *Denny's*, 234 Cal.App.3d at 1794 (if "the insured's liability exceed[s] the underlying insurance limits . . . liability attaches to the excess insurer, whether or not the underlying insurer has actually paid out the policy limit"); *Vons* 78 Cal.App.4th at 64 (coverage is triggered under an excess policy for losses the policyholder is legally obligated to pay in excess of underlying coverage).

The Court's holding is bolstered by the California cases that have found that an umbrella or excess insurance company has an obligation to participate in settlements when the potential settlement may invade that insurance company's limits of liability, even though the insurance underlying the excess insurance policy is not yet exhausted. *See, Kelley v. British Coml. Ins. Co.*, 221 Cal.App.2d 554 (1963); 1 Windt, Insurance Claims & Disputes § 5.26 p. 350 (3d ed. 1995) ("The fact that the excess insurer should have no duty to defend, since the primary insurer should still be providing a defense, is irrelevant. The duty [of an excess insurance company] to settle exists independently of the duty to defend."); *Diamond Heights Homeowners v. Nat'l American Ins. Co.*, 227 Cal.App.3d 563, 581-82, 277 Cal.Rptr. 906 (1st Dist. 1991); *Transit Cas. Co. v. Spink Corp.*, 94 Cal.App.3d 124, 135, 156 Cal.Rptr. 360 (1979).

Having found that it is the liability of the policyholder, and not the conduct of the underlying insurance company, that triggers the umbrella or excess insurance companies' obligations, the Court concludes as follows:

1. Actual payment in cash by underlying insurance companies is not a condition precedent to an umbrella or excess insurance company's obligation. An umbrella or excess insurance company has obligations that pre-exist and are independent of actual exhaustion by payment of the underlying limits. These obligations include, the duty to participate in settlement negotiations [*Kelley*, 221 Cal.App.2d 554], the duty to accept a reasonable settlement [*Diamond Heights*, 227 Cal. App. 3d 563; *Armstrong*, 45 Cal. App. 4th at 85; *Comunale v. Traders & General Ins. Co.* 50 Cal.2d 654, 658 (1958)], the duty of good faith and fair dealing [*Schwartz v. State Farm Fire and Cas. Co.*, 88 Cal. App. 4th 1329 (2001)], the duty to inquire when the underlying insurance company is insolvent [*Span*, 227 Cal.App.3d 463], and the duty to pay that portion of the liability that exceeds the underlying coverage [*Span*, 227 Cal. App. 3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52].

2. Exhaustion by payment is not a prerequisite to triggering an umbrella or excess insurance company's obligation, as opposed to the transfer of the duty to defend. Such an obligation is triggered by a liability that exceeds underlying coverage. *Span*, 227 Cal.App.3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52; Joint Insurers' Phase IB Trial Brief, at p. 14.

3. Accordingly, the fact that an underlying insurance company may have paid its limits to Fuller-Austin or the Fuller-Austin Asbestos Settlement Trust ("Trust"), and this money has not yet been distributed to claimants, is irrelevant to the inquiry of whether the umbrella or excess insurance company's obligations have been triggered. Additionally, and as discussed more fully below, the payment by the underlying insurance company accompanied

by a dismissal from the action constitutes exhaustion of the dismissed party's limits, thus rendering this inquiry moot. *Phoenix Ins. Co v. U.S. Fire Ins. Co.*, 189 Cal.App.3d 1511 (1987).

4. Likewise, installment payments by settling insurance companies constitute exhaustion of coverage where such payments are made for liabilities that exceed the settling insurance company's policy limits. The timing of these payments negotiated through settlement does not inure to the benefit of the non-settling and remaining Joint Defendants. The fact that an underlying insurance company may have been able to secure a beneficial payment schedule has no effect on the relevant inquiry – whether the liability in question triggers the excess insurance coverage.

5. Where the policyholder and the insurance company contest exhaustion, the burden is on the insurance company to prove exhaustion. *Hartford Acc. & Indem. Co. v. Sup. Ct.*, (*Syntex*), 23 Cal.App.4th 1774 (1994). However, if the dispute is resolved, and the insurance company is dismissed without a cross-claim asserted by a non-settling insurance company, the inquiry is complete and the settled insurance company's insurance limits are deemed exhausted. Here, there is no dispute between the settled insurance companies and Fuller-Austin as to whether the settled insurance policies are exhausted.

VI. ISSUE NO. 5 – EXHAUSTION AS A MATTER OF LAW

A. Overview of Dispute

Fuller-Austin contends that when an insurance company settles and is dismissed from a coverage action,

and the remaining insurance companies do not cross-claim against the settling insurance company, then the settling insurance company's policies are deemed exhausted. *Phoenix*, 189 Cal. App. 3d 1511. Joint Defendants insist that the only method of exhausting a policy is by *actual payment* of policy limits on account of judgments or settlements in the underlying cases. Consequently, Joint Defendants assert they have no obligations whatsoever under their policies until Fuller-Austin proves such exhaustion. Further, Joint Defendants argue they, could not have cross-claimed against the settling defendants as a result of the channeling injunction which, Joint Defendants assert, bars such actions.

B. Status of Settled Policies

It is undisputed that the following insurance companies have settled and been dismissed from this action:

1. April 2, 1997 – Commercial Union dismissed from the action.
2. July 2, 1998 – AIG dismissed from the action
3. July 28, 1998 – Fuller-Austin filed fifth amended complaint removing Security – a *de facto* dismissal.
4. February 10, 1999 – Appalachian dismissed from the action.
5. March 22, 1999 – Wausau dismissed from the action.
6. May 6, 1999 – Security dismissed from the action.

7. November 22, 2000 – Allstate dismissed from the action.

Additionally, London Market has settled certain of its policies. The settlements have been marked as exhibits in this Phase. See, Trial Exhs. 873-878. No objections were filed to the settlements or dismissals, and no cross-claims were brought against the settling defendants.

C. Court's Ruling on Exhaustion as a Matter of Law

Phoenix stands for the proposition that when the policyholder settles and dismisses an insurance company from a coverage action without the non-settling insurance companies filing cross-claims for contribution, subrogation, or other equitable relief against the settling insurance company, the settling insurance company's policies will be deemed exhausted. Joint Defendants' reliance on case law that holds that there must be exhaustion for purposes of transferring the duty to defend are not relevant to this inquiry. As noted in the discussion herein, there are obligations recognized by the courts and spelled out in the policies that exist independent of the duty to defend and irrespective of actual exhaustion by payment.

The rationale behind the *Phoenix* ruling is entirely applicable here. The remaining Joint Defendants are disputing whether the primary insurance coverage has been exhausted. That dispute, however, should be between the excess insurer and the settling primary insurer. It is not appropriate to place Fuller-Austin, a policyholder that does not have documentation regarding an insurance company payments for purpose of exhaustion, in the position of having to prove exhaustion of insurance provided by

parties that are no longer in the case. If the Joint Defendants wanted to challenge exhaustion of coverage provided by settling insurance companies, they had the right to (i) object to the settlements and dismissals at the time they were filed with the Court, and (ii) assert cross-claims against their co-defendants on the "exhaustion" dispute. Having declined to pursue these remedies, the remaining Joint Defendants cannot challenge the exhaustion of the settled policies. that is precisely the circumstances that the *Phoenix* decision was intended to address.

Finally, the Court is not persuaded by Joint Defendants' argument that they were barred from seeking equitable contribution or subrogation from the settling insurance companies based on the channeling injunction issued by the bankruptcy court. There are several flaws with this argument, including the fact that several of these settlements and dismissals occurred prior to the bankruptcy and, yet, Joint Defendants did not object to the settlements and dismissals or cross-claim against the settling defendants [Commercial Union and AIG]. Likewise, Joint Defendants made no attempt to appeal the bankruptcy court's ruling with respect to granting a channeling injunction to those insurance companies that settled.

Accordingly, the Court rules, as follows:

1. The policies issued by the settled and dismissed insurance companies are deemed exhausted as a matter of law.

VII. EXCESS POLICY TRIGGERS

A. Overview of Dispute

Fuller-Austin contends that there are several events that trigger the umbrella and excess insurance companies' obligations.

Prior to its bankruptcy, Fuller-Austin had judgments and settlements that were in excess of any remaining primary coverage, thus triggering the umbrella and excess insurance companies' obligations. Fuller-Austin contends that the confirmation of the bankruptcy plan is a judgment and an adjudication, as those terms are used in the policies, and that the bankruptcy establishes Fuller-Austin's liability and damages for the underlying asbestos claims. Consequently, Fuller-Austin argues that under the policy language and case law, the judgment and adjudication obligates the excess insurance companies to pay the full aggregate value of Fuller-Austin's legal obligation for pending and future asbestos claims, and that a jury should be allowed to determine the aggregate amount of damages based on expert testimony and other evidence.

Additionally, Fuller-Austin maintains that the "allowed amount", as defined in the bankruptcy is, at a minimum, the allowed liquidated value attributable to a given claim. Further, Fuller-Austin insists that the "allowed amount" for all of the asbestos victims whose rights were necessarily adjudicated by the confirmation of the plan is Fuller-Austin's liability.

Finally, relying on *Armstrong*, Fuller-Austin contends that it is entitled to a presumption that the asbestos claims adjudicated by the bankruptcy judgment are harm within the coverage of each and every one of its insurance policies.

The Joint Defendants argue that no obligations arise until, and unless, Fuller-Austin proves to their satisfaction that all policies attaching at a lower level, including insolvent insurance policies, are exhausted by payment of judgments or settlements. Alternatively, Joint Defendants maintain that, although they may have obligations to pay judgments or settlements that are in excess of the underlying coverage, the confirmation of the plan or reorganization is not a judgment and, as a settlement, it is not binding on the insurance companies because the companies did not consent.

Assuming arguendo that the judgment is binding, the Joint Defendants suggest that the umbrella and excess insurance companies are not obligated to pay the allowed liquidated value, but only the amount that Fuller-Austin is able to pay. Joint Defendants contend that the amount Fuller-Austin actually pays to a claimant is the "allowed amount" under the plan documents, and, therefore, Fuller-Austin's liability. Moreover, Joint Defendants insist that they only are obligated to pay this amount if, and when, a claim is allowed and that Fuller-Austin has the burden of demonstrating that each asbestos claim is for harm within coverage.

Overview of Trigger of Umbrella and Excess Insurance Companies' Obligations

The Legal questions posed are what are an umbrella or excess insurance company's obligations and when do they arise? The answers to these questions will impact (i) whether the umbrella and excess insurance companies had obligations to Fuller-Austin prior to Fuller-Austin's bankruptcy, and (ii) whether these umbrella and excess

insurance companies have obligations as a result of Fuller-Austin's bankruptcy.

California courts have imposed independent duties on an umbrella or excess insurance company to settle or to participate in settlements prior to the exhaustion of underlying insurance coverage. An umbrella or excess insurance company, given notice of a proposed settlement, is faced with choices: The umbrella or excess insurance company can acknowledge coverage and assume the defense or take over settlement negotiation; the umbrella or excess insurance company can deny coverage; the umbrella or excess insurance company can do nothing, neither acknowledging coverage or denying coverage. As discussed below, each of these actions by the umbrella or excess insurance company has consequences.

C. Court's Ruling on Excess Policy Triggers

Legal Principles. California law recognizes that an excess insurance company has obligations that arise prior to, and irrespective of exhaustion (either by payment or through allocation), as follows:

1. An excess insurance company has an obligation to ensure that the insured receives the benefits of its policy. This obligation arises at the inception of the policy, not upon the exhaustion of the underlying policy. Accordingly, exhaustion of underlying insurance is not a condition precedent to triggering an excess insurance company's obligations. *Schwartz*, 88 Cal. App. 4th 1329.

2. An excess insurance company has a duty to accept reasonable settlements on its policyholder's behalf. This duty is separate and independent from any duty to defend

and arises prior to exhaustion by payment of claims. *Kelley*, 221 Cal. App. 2d at 563; Windt, Insurance Claims & Disputes § 5.26 p. 350 (3d ed. 1995) ("The fact that the excess insurer should have no duty to defend, since the primary insurer should still be providing a defense, is irrelevant. The duty [of an excess insurance company] to settle exists independently of the duty to defend."); Cal. Prac. Guide, at ¶ 12.93 ("[w]here the insured has both primary and excess liability coverage, each insurer owes a duty to accept reasonable settlement demands within its policy limits").

3. Even if an excess insurance company has not denied coverage or refused to defend, the insurance company has a duty to accept a reasonable settlement, and its refusal to settle may give rise to the insured's action for reimbursement of the settlement and a presumption that the claims settled are harm within the coverage. *Armstrong*, 45 Cal.App.4th at 85, 52 Cal.Rptr.2d 690. As found in *Armstrong*:

> The Isaacson court went on to say that even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. (44 Cal.3d at p. 792; see also Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198].) (26b) In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the

amount of the insured's liability. (Isaacson v. California Ins. Guarantee Assn., supra, 44 Cal.3d at pp. 793-794.)

4. An excess insurance company's obligation to participate in settlement negotiations arises when a liability potentially exceeds the underlying insurance coverage – even though the underlying coverage is not exhausted by payment of claims. *Diamond Heights*, 227 Cal.App.3d 563; *Transit Cas.*, 94 Cal.App.3d at 135.

5. Three options are available to an umbrella or excess insurance company when asked to contribute to settlement that invades its policy limits: (i) assume the defense and take the case to trial, (ii) accept the settlement and seek reimbursement from a primary insurance company, or (iii) challenge the settlement as unreasonable and collusive. *Diamond Heights*, 227 Cal.App.3d at 578-580; California Insurance Law Handbook (West Group 2001), § 32.03 at p. 658; California Liability Insurance Practice, Claims and Litigation. Vol. 2, (CEB 2000), § 17.43.

6. An excess insurance company has a heightened duty of inquiry regarding pending claims when the underlying insurance company is insolvent. *Span*, 227 Cal.App.3d 463.

7. An excess insurance company's right to participate in settlement negotiations and to consent to settlements only arises where it has acknowledged coverage. If an excess insurance company reserves its right to contest coverage, the policyholder is excused from any provision requiring insurance company consent. 14 Couch on Insurance (3d ed. 1999) § 199:48, p. 199-92. By reserving its right to deny coverage, the insurance company surrenders

the right to control the conditions of payment. *United Services Auto. Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987); *Insurance Co. of North America v. Spangler*, 881 F.Supp. 539, 544 (D. Wyo. 1995) (no breach of policy provision where insured settles without insurance company's consent where insurance company defending under reservation of rights); *Taylor v. Safeco Ins. Co.*, 361 So.2d 743 (Fla.Dist.Ct.App.1978) (same).

8. An excess insurance company's obligations are triggered by a liability that exceeds the underlying insurance and invades the excess insurance company's limits. *Span*, 227 Cal.App.3d at 468; *Deny's*, 234 Cal.App.3d at 1794; *Vons*, 78 Cal.App.4th at 64; *Benroth*, 132 F.Supp.270 (1955) (applying Louisiana law); *Zeig*, 23 F.2d 665; *Rummel*, 123 N.M. 752.

9. An excess insurance company's obligation to pay that portion of a liability that exceeds the underlying insurance is independent of and not affected by whether the underlying insurance company has paid its limits or paid anything at all. *Span*, 227 Cal.App.3d at 468; *Denny's*, 234 Cal. App. 3d at 1794; *Vons*, 78 Cal. App. 4th at 64; *Gasquet*, 391 So.2d 466; *Futch*, 166 So.2d 274; *Benroth*, 132 F.Supp. 270 (1955) (applying Louisiana law); *Zeig*, 23 F.2d 665 (2d Cir. 1928) (Augustus Hand, J.)); *Rummel*, 123 N.M. 752, (N.M.1997).

10. An insurance company's obligation to its policyholder does not end upon the filing of a lawsuit by the policyholder against the insurance company for the purpose of determining the insurance company's obligations. *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 (1985).

11. An insurance company's obligation to its policyholder does not end if the policyholder is bankrupt or

insolvent. Cal. Ins.Code § 11580. In fact, a policyholder's bankruptcy transforms indemnity policies into liability policies [*Haisten*, 784 F.2d at 1403] and excuses a policyholder from conditions it cannot meet as a result of the bankruptcy [*In the Matter of Federal Press*, 104 B.R. 56, 62 (N.D.Ind. 1989)]; *Home Insurance Company of Illinois v. Hooper*, 294 Ill. App. 3d 626, 632-634, 691 N.E.2d 65 (1998).

It is not disputed that as of February 1993, Fuller-Austin gave notice to the umbrella and excess insurers that Fuller-Austin may encounter asbestos liabilities that would impact its umbrella and excess coverage. Subsequently, Fuller-Austin gave the low-level umbrella insurance companies notice of potential settlements that, given the remaining limits on the primary coverage, Fuller-Austin believed impacted these umbrella policies. The umbrella insurance companies did not pay any of these settlements prior to the bankruptcy. Further, it is also undisputed that (i) Fuller-Austin provided notice to the Joint Defendants that it would entertain global settlement negotiations with representatives of both present and future asbestos claimants with a goal to accomplish a global settlement in conjunction with a filing for bankruptcy, and (ii) Fuller-Austin provided notice to defendants of the bankruptcy plan and hearings. Clearly, the excess insurance companies' obligations were triggered.

Bankruptcy As Judgment, Adjudication Or Settlement. The policies pay legal obligations after adjudication or compromise (*i.e.*, settlement). The confirmation of the plan of reorganization is, as a matter of law, a judgment. 11 U.S.C. §§ 1141, 1142; Bankruptcy Rule 9001; *see*, 5 *Moore's Federal Practice* 3d § 131.23[5][b]; ("Many rulings

and orders that occur under the umbrella of a bankruptcy proceeding are in the nature of final judgments. . . . Examples include confirming compositions, arrangements or reorganization plans."); *Sioll v. Gottlieb*, 305 U.S. 134, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *In re French Gardens, Ltd.*, 58 B.R. 959 (S.D.Tex.1986); *In re Emmer Brothers Co.*, 52 B.R. 385 (D.Minn.1985); *In re Economy Lodging Systems, Inc.*, 1999 WL 184058 (1999). It also is an "adjudication" of Fuller-Austin's liability and damages. *Federated Management Company v. Latham & Watkins*, 138 Ohio App.3d 815, 742 N.E.2d 684 (2000) ("In the bankruptcy context, an order confirming a plan of reorganization constitutes a judgment and a final adjudication on the merits of a bankruptcy proceeding."); Webster's Ninth New Collegiate Dictionary, 1985, p. 56. ("adjudication" defined as "a decree in bankruptcy"); Random House Unabridged Dictionary, Second Edition, 1997, p. 25 ("adjudication" defined as "a court decree in bankruptcy").

As a judgment and an adjudication by a court, the liabilities established by the confirmed bankruptcy plan trigger coverage under the insurance policies. *Certain Underwriters at Lloyd's London v. Superior Court ("Powerine")*, 24 Cal.4th 945, 960 (2001). *Powerine*, which cited *AIU* approvingly, reaffirmed the proposition that the duty to indemnify "embraces all money ordered by a court, including money that the insured must give under law as compensation to third parties' and also 'money that the insured must itself expend *in equity* in order to provide relief of the same sort." *Powerine*, 24 Cal.4th at 966. Under California law, the judgment is presumed to encompass harm within the coverage. *Armstrong*, 45 Cal.App.4th at 62-3.

The Joint Defendants' arguments that the bankruptcy proceedings were not an "actual trial," as the term is used in the policies is unavailing. The requirement of an "actual trial" is found in the "no-action" clause. California courts hold that the "no-action" clause has no application in the context of a suit by a policyholder against its own insurance company. *Earth Elements, Inc. v. National Am. Ins. Co. of Cal.*, 41 Cal. App. 4th 110 (1995). Even assuming that an "actual trial" was a prerequisite to coverage, the Court finds that, as matter of law, the bankruptcy adjudication satisfies the two components of an "actual trial": "(1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for fraud and abuse." *Pruyn v. Agricultural Ins. Co.*, 36 Cal.App.4th 500, 517 (1995) (quoting *National Union Fire Ins. Co. v. Lynette C.*, 27 Cal.App.4th 1434, 1449 (1994)).

Here, the bankruptcy court was bound to exercise independent review and make specific findings before approving the proposed consensual plan of reorganization. 11 U.S.C. § 1129(a)(3); 11 U.S.C. § 524(g); *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr.S.D.N.Y. 1988) (citations omitted) ("The important determinations in reorganization proceeding must receive the 'informed independent judgment of the Bankruptcy court'.").

The bankruptcy court was required to assess independently whether the compromises contained in Fuller-Austin's reorganization plan were "within the reasonable range of litigation possibilities." *Texaco*, 84 B.R. at 902. Indeed, Fuller-Austin's plan only could be approved if it was proposed in good faith and was not collusive, a finding that the bankruptcy court specifically made. 11 U.S.C. § 1129(a)(3). The Court finds that the process employed by

the bankruptcy court meets the definition of "actual trial" set forth in *Pruyn* and *Lynette C.*

The fact that the excess insurance companies were found to have no standing in the bankruptcy matter does not make the judgment a nullity as to them. An insurance company is bound by the finding of liability and damages even where it is denied standing in the underlying action that established the policyholder's legal obligation. *Tomassi v. Scarff*, 85 Cal. App. 4th 1053, (2000):

> The judgment in the liability action collaterally estops the insurer only on issues necessarily adjudicated in the liability action, i.e., the insured's liability and the amount of the insured party's damages. It does not bind the insurer on coverage issues. *Tomassi*, 85 Cal.App.4th at 1057, 102 Cal.Rptr.2d 750.

Obligation To Pay Liability In Full. Finally, two questions have arisen as to (i) whether the Joint Defendants are responsible for Fuller-Austin's legal obligation, as opposed to the amount Fuller-Austin is able to pay, and (ii) whether the Joint Defendants only pay when Fuller-Austin allows a claim.

As to the first inquiry, the Court finds that the policies provide that the excess insurance companies pay Fuller-Austin's entire legal obligation up to their respective policy limits. Not only do the insuring agreements provide for such a result, but the fundamental purposes of the bankruptcy or insolvency provisions of their policies would be thwarted if insurance companies were allowed to escape responsibility based on an insolvent policyholder's inability to pay. Cal. Ins.Code § 11580; *Webster v. Superior Court*, 46 Cal.3d 338, 347-48 (1988); *Johnson v. Holmes*

Tuttle Lincoln-Mercury, 160 Cal. App. 2d 290 (1958). The authorities cited to the Court are consistent on this issue. *See, Insurance Co. of the State of Pennsylvania v. Associated International Ins. Co.*, 922 F.2d 516 (9th Cir. 1991); 1 Couch on Insurance (3d ed.1999) § 9:26, p. 199-92. The policies at issue in this action are liability policies that pay Fuller-Austin's legal obligation, and not merely what Fuller-Austin has been able to pay.

The plan documents also are clear that the "allowed amount" is Fuller-Austin's legal obligation. This amount is, at a minimum, the "allowed liquidated value." The Court is not persuaded by the Joint Defendants' argument that the "allowed amount" equals the "allowed liquidated value" divided by the "payment sum percentage." The plan documents simply do not lend themselves to that interpretation, and the testimony of witnesses involved in the drafting of these documents and in the administration of the Trust belies such an interpretation.

Likewise, in the reinsurance context, insurance companies receive reimbursement for liabilities, not just payments. *Associated International*, 922 F.2d 516; 1 Couch on Insurance (3d ed.1999) § 9:26, p. 199-92 ("the reinsured's claim against the reinsurer is not based upon its relative ability to pay, but upon its liability to pay.").

Aggregate Asbestos Liability. The Court further finds that Fuller-Austin will be entitled to present evidence to a jury regarding its aggregate asbestos liability – *i.e.*, the present liability of Fuller-Austin to pay pending and future asbestos claims. The right to establish and recover future damages in a contract or tort action is a fundamental tenet of California law. Cal.Civ.Code § 3283 ("INJURIES RESULTING OR PROBABLE AFTER SUIT BROUGHT.. Damages

may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."). The key to awarding such damages is whether there is a sufficient method for ascertaining these damages. Future damages may be awarded where there is a satisfactory method for obtaining a reasonably proximate estimation; there is no requirement for mathematical precision. *Noble v. Tweedy*, 90 Cal.App.2d 738, 203 P.2d 778 (1949); *Stott v. Johnston*, 30 Cal.2d 864, 229 P.2d 348, 355 (1951).

The ability to calculate present and future asbestos liabilities and the methodologies employed by Fuller-Austin's experts, Dr. Peterson and Dr. Florence, have been recognized in published opinions. *See, In re Johns-Manville Corp.*, 830 F.Supp. 686 (S.D.N.Y.1993); *Eagle Picher*, 189 B.R. 68. The acceptance of this scientific evidence is sufficient to meet the standard in California set forth in *People v. Kelly*, 17 Cal.3d 24, 32 (1976). In other words, a "case-by-case adjudication as to the 'general acceptance' prong of the Kelly test is not required once the scientific technique has been endorsed in a published appellate opinion." *People v. Barney*, 8 Cal.App.4th 798, 824-25 (1992); *People v. Morganti*, 43 Cal. App. 4th 643, 658, 666 (1996).

Fuller-Austin finds support for its position in the case law addressing reinsurance. For example, in *Associated International*, 922 F.2d 516, an insurance company sought coverage from its reinsurer for a settlement which bound the insurance company to pay both present and future asbestos claims. Under the same insuring agreement language presented here – "to indemnify [the policyholder] for all sums which [the insured] shall be obligated to pay by reason of the liability . . . "– the Court held that the

reinsurer was obligated to pay the future claims, as well as the present claims subsumed in the settlement.

Fuller-Austin finds further support in the Seventh Circuit's decision in *UNR Industries, Inc. v. Continental Ins. Co.*, 942 F.2d 1101 (7th Cir. 1991), cert. denied, 503 U.S. 971 (1992), which addressed the precise issues of insurance coverage for asbestos bodily injury claims in the context of a bankruptcy. The Court finds no meaningful differences between the law and facts presented in *UNR* and the Fuller-Austin circumstances.

The Seventh Circuit held that UNR's reorganization "was a judgment or settlement and so triggers CNA's insurance obligations." 942 F.2d at 1104-05. In particular, the order confirming UNR's reorganization, like the one confirming Fuller-Austin's reorganization, was final, binding, and established the policyholder's obligations sufficient to trigger coverage. 942 F.2d at 1104-05. The *UNR* court rejected CNA's position that the amount of UNR's loss depends on how much money the UNR Trust is actually able to pay. To do otherwise, would "threaten[] to confer a windfall on CNA at the asbestos victim's expense." 942 F.2d at 1105. Likewise, the Fuller-Austin Trust is required to pay the full amount of the claims to the extent that it has available assets. Fuller-Austin's insurance companies also are required to pay the full asbestos liabilities, and cannot obtain a "windfall" as a result of the bankruptcy. *See also, Webster*, 46 Cal.3d at 347-48, 250 Cal.Rptr. 268, 758 P.2d 596 (principal purpose of § 11580 is to preclude an insurer from "windfall" as a result of insured's bankruptcy).

The *UNR* court also held that the aggregate value of all of the asbestos claims (both present and future) had

been determined in the bankruptcy proceedings and that determination was binding on CNA. *Id.*, at 1105. Here, the parties agreed that the valuation of Fuller-Austin's asbestos claims would be preserved and made in this action. Once made, it should be binding on Joint Defendants.

The *UNR* court held that an excess insurance company, CNA, would be liable for the full value of pending and future asbestos claims based on a bankruptcy-established liability. The *UNR* court rejected CNA's position that the amount of UNR's loss depends on how much money the UNR Trust is actually able to pay. To do otherwise, would "threaten[] to confer a windfall on CNA at the asbestos victim's expense." 942 F.2d at 1105. Fuller-Austin's insurance companies also are required to pay the full asbestos liabilities, and cannot obtain a "windfall" as a result of the bankruptcy.

The Court finds that the approaches and principles set forth in the *UNR* decision are persuasive and helpful in resolving this dispute.

As to the question of "consent," the Court rules that the confirmation of the bankruptcy plan is an "adjudication" and, therefore, rendered the issue of consent moot. Nevertheless, even if the Court were to view the confirmation as a "compromise." Fuller-Austin did not breach the insurance policies as a result of filing for bankruptcy without the express approval of the insurance company Joint Defendants. Prior to the bankruptcy, all of the Joint Defendants had been provided notice of the bankruptcy negotiations, were offered an opportunity to participate in

the negotiations[19], were provided copies of the bankruptcy plan, and participated in the confirmation hearing by filing objections. These undisputed facts are sufficient to establish, under California law, that Fuller-Austin met its obligations under the insurance policies triggering Joint Defendants' right to consent to Fuller-Austin's global settlement, and Joint Defendants' obligations arising therefrom.

Notice And Consent. The parties have spent considerable effort providing the Court with California case law on "consent." The Court adopts the following principles and authorities.

---

[19] On October 17, 1997, Fuller-Austin addressed correspondence to its insurance carriers advising of the proposed global settlement negotiations in the underlying asbestos claims. This correspondence contained the following two separate statements:

1. "Fuller's insurance companies have the option of directing Fuller not to engage in such negotiations or settlement, however Fuller will accept such a direction only if accompanied by written binding commitments wherein all insurers accept tender of asbestos claim defense and asbestos claim indemnity without a reservation of rights."

2. "We have no objection to your representative participating in this settlement process in an appropriate manner; however, the execution of an appropriate understanding will be required in order to protect the privileged nature of the discussions, and to avoid interference with the negotiation process."

Exhs. 7683, 7684. Two representatives, Charles Carluccio for the London Market Insurers and Charles Eisner for Appalachian Insurance Company, attended portions of the October 21, 1997 meeting and were excluded from portions of the meeting. *See Eisner Testimony, September 26, 2001, at pp. 1830 and 1839.*

Waiver of Notice and Control. As set forth in the California Practice Guide:

> "An insurer that has erroneously denied coverage cannot avoid liability for its failure to settle or defend by claiming lack of opportunity to do so. By denying coverage, the insurer waives its right to control defense of the third party action. The insured therefore is under no obligation to notify the insurer upon being served or to request a defense."

Cal. Prac. Guide, ¶ 12:606, citing *CNA Cas. of Calif. v. Seaboard Sur. Co.*, 176 Cal.App.3d 598, 618 (1986) ("the law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with."); *Perkins v. Allstate Ins. Co.*, 63 F.Supp.2d 1164, 1175-76 (C.D.Cal.1999) (applying California law). "Similarly, when coverage and a defense have been denied, the insured owes no duty to keep the insurer informed of subsequent developments in the third party lawsuit – *e.g.*, of the trial date, or of a settlement agreement between the insured and injured party." Cal. Prac. Guide, ¶ 12:609, citing *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 242 (1981). After coverage has been denied, the insured need not "go through the motions of requesting a defense." Cal. Prac. Guide, ¶ 12:613, citing *Samson*, 30 Cal.3d at 239. An "open-ended denial" in which the insurer expresses a willingness to reconsider upon additional information is tantamount to a denial. Cal. Prac. Guide, ¶ 12:615.5, citing *Perkins*, 63 F.Supp.2d at 1174; *National American Ins. Co. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (1996) ("where an insurer does not respond to notice from the insured that it intends to settle with an adversary, the insurer may not

then invoke a clause in the policy requiring the insured to obtain approval prior to settling any claims.").

Failure to Settle. An insurer acts at is own risk when it refuses to defend or settle a claim:

> "If coverage is ultimately established, the insurer is liable for all damages resulting from its refusal to settle: 'If an insurer honestly believes that its policy does not provide coverage and, therefore, chooses to reject a reasonable settlement offer, it must bear the responsibility if coverage is found."

Cal. Prac. Guide, ¶ 12:621 (emphasis in original), citing *Samson*, 30 Cal.3d at 237; *Johansen v. California State Auto. Ass'n, Inter-Ins. Bureau*, 15 Cal.3d 9, 12 (1975). An insurer's wrongful refusal to assume the defense of underlying litigation forfeits its right to control settlement and defense. Cal. Prac. Guide, ¶ 12:632, citing *Clark v. Belefonte Ins. Co.*, 113 Cal.App.3d 326, 335 (1980); *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal.3d 775, 791 (1988); *Pruyn*, 36 Cal. App. 4th at 520-25. As further noted in the California Practice Guide:

> "Even though an insurance policy precludes insureds from settling claims without the consent of the insurer, the insured is permitted to make a good faith, reasonable settlement when the insurer wrongfully denies coverage and refuses to defend. In these situations, '*the insurer is deemed to have waived* its rights under the "no action" clause.'"

Cal. Prac. Guide, ¶ 12:633 (emphasis in original), citing *Diamond Heights*, 227 Cal. App. 3d at 581; *Lamb v. Belt Cas. Co.*, 3 Cal.App.2d 624, 631 (1935). Even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the

insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. As set forth in the *Armstrong* decision:

> "[E]ven if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. (44 Cal.3d at p. 792; see also Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198].) In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the amount of the insured's liability. (Isaacson v. California Ins. Guarantee Assn., supra. 44 Cal.3d at pp. 793-794.)"

Armstrong, 45 Cal.App.4th at 85.

Presumptions Arising from Coverage Denial. Where coverage has been denied, the insured is free to settle the underlying claim in good faith. The settlement, at a minimum, gives rise to presumptions in the insured's favor:

> "Where a refusal to defend is shown, the insured is given the benefit of an evidentiary presumption that any settlement negotiated with the injured party was reasonable: *i.e.*, that the third party's claim against him or her was legitimate, and that the insured was liable in the amount he or she agreed to pay in settlement. . . ."

Cal. Prac. Guide, ¶ 12:655, citing *Isaacson*, 44 Cal.3d at 791, 244 Cal.Rptr. 655, 750 P.2d 297. The presumption, under these circumstances, is rebuttable. Cal. Prac. Guide, ¶ 12:656. However, where there is "adequate judicial participation" in approving or confirming the settlement, the presumptions in favor of the insured are binding in later proceedings:

> "if the judicial participation amounts to a default judgment or uncontested trial, this independent adjudicatory action obviates any concern re fraud or collusion, and *binds* the insurer in subsequent proceedings."

Cal. Prac. Guide, ¶ 12:661.1, citing *Pruyn*, 36 Cal. App. 4th at 527-28. Accordingly, where there is active judicial participation, a settlement may bind the insurer absent fraud or collusion. *See also* 1 Windt § 6.22, p. 429.

Lack of Standing No Defense. The consequences of a denial of coverage are applicable even where the insurance company has been denied standing in the underlying action between the injured party and the policyholder. *Tomassi*, 85 Cal.App.4th 1053.

Rulings. With this legal framework, the Court makes the following rulings:

1. The Joint Defendants insuring obligations were triggered by knowledge of asbestos liabilities potentially exceeding their attachment points and by Fuller-Austin's request that excess insurance companies participate in the handling and settling of the asbestos lawsuits – both prior to and after Fuller-Austin's bankruptcy.

2. Fuller-Austin's confirmed bankruptcy plan is a binding federal court judgment and adjudication that

establishes Fuller-Austin's liability and its legal obligations to pay damages to all pending and future asbestos claimants. It is not merely a stipulated judgment or settlement. The bankruptcy court's statutorily-required independent review and approval of the bankruptcy process constitutes "adequate judicial participation" so as to establish that the fact of Fuller-Austin's liability and the amount of Fuller-Austin's damages established in the bankruptcy proceeding are binding on Fuller-Austin and on the defendant insurance companies. *Pruyn*, 36 Cal.App.4th at 517; *Lynette C.*, 27 Cal.App.4th at 1449.

3. The Court finds that the "actual trial" requirement found in the "no-action" provision is not applicable to a lawsuit between a policyholder and its insurance companies. *Earth Elements*, 41 Cal.App.4th 110. In any event, the Court finds that the standards applied by the bankruptcy court would, as a matter of law, satisfy the "actual trial" requirement as it has been interpreted by California case law. *Pruyn*, 36 Cal.App.4th at 517; *Lynette C.*, 27 Cal.App.4th at 1449.

4. Fuller-Austin's insurance companies are obligated to pay the full allowed amount established by the federal court with respect to each asbestos claim, notwithstanding the fact that Fuller-Austin will only be able to pay a percentage of these values because of its bankrupt status. Such obligation was triggered at the time that the bankruptcy judgment was entered, subject to the determination of the aggregate value of this liability in this action and the resolution of any coverage defenses, which were reserved for this action.

5. The determination of the "aggregate value" of Fuller-Austin's liabilities to pending and future asbestos

claimants – *i.e.*, the dollar amount of the bankruptcy court judgment against Fuller-Austin – will be determined in the jury phase of this case, based on expert testimony and statistical evidence, as is typical in assessing damages in contract or tort disputes. The Court finds that Drs. Peterson and Florence qualify as experts on this subject matter and, further, that their methodologies satisfy the *Kelly* test for admissibility.

6. The asbestos liabilities adjudicated in the bankruptcy are presumed to be harm within coverage. *Armstrong*, 45 Cal. App. 4th at 85. It is Joint Defendants' burden at trial to prove otherwise.

7. The expenses incurred by the Fuller-Austin Settlement Trust in carrying out its obligations pursuant to the bankruptcy judgment, including start-up and operating expenses and the costs of establishing insurance coverage, are covered expenses under the "ultimate net loss" provisions contained in the policies.[20]

VIII. TRIGGERING DATES AND EVENTS

A. Overview of Dispute

Fuller-Austin contends that the Joint Defendants' insuring obligations arose prior to and as a result of Fuller-Austin's bankruptcy based on various events that

---

[20] Based on the Court's prior Order on defendant Columbia Casualty's Motion for Summary Adjudication dated December 22, 1999, the following policies should be excluded from item 7 regarding the payment of Fuller-Austin's investigation, adjustment, defense or appeal costs or expenses: Columbia Casualty RDU 3652850, Columbia Casualty RDX 4170236, International XSI 7030, and Transcontinental policies RDX 00961 65 63, RDX 009 61 65 77, and RDX 009 61 65 05.

triggered their obligations. Joint Defendants dispute that their insuring obligations arose at anytime.

B. Court's Ruling on Triggering Events

Whether, and to what extent, certain events triggered the Joint Defendants' insuring obligations is largely a factual question that is reserved for the jury. Based on the rulings by the Court set forth above, the Court will apply the following standards to the jury phase of this proceeding in determining whether the Joint Defendants' insuring obligations were triggered.

1. An excess insurance company has a duty to cooperate in the defense of an underlying claim when it appears reasonably likely to involve its coverage. Exhaustion of underlying coverage is not a "condition precedent" to triggering an excess insurance company's obligations. *Schwartz*, 88 Cal.App.4th at 1335.

2. Notice of a liability that exceeds, or potentially exceeds, an excess insurance company's stated attachment point triggers coverage obligations. *Span*, 227 Cal.App.3d at 468, *Denny's*, 234 Cal. App. 3d 1794, *Benroth*, 132 F.Supp. at 275-76 (applying Louisiana law).

3. An excess insurance company has an obligation to evaluate proposed settlements, and to accept a reasonable settlement, where the liability penetrates, or potentially penetrates, the excess insurance company's level of coverage. *Diamond Heights*, 227 Cal.App.3d at 578; *Armstrong*, 45 Cal. App. 4th at 85; *Kelley*, 221 Cal. App. 2d at 563.

An insurance company's obligation to its policyholder does not end upon the filing of a lawsuit by the policyholder. *White*, 40 Cal.3d at 885.

These legal standards will establish the parties' rights and obligations in all later phases of this case.

IT IS SO ORDERED AND ADJUDGED.

Dated: August 6, 2002 /s/ Judith C. Chirlin
Honorable Judith C. Chirlin
Judge of the Superior Court

Filed 2/17/06

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FULLER-AUSTIN INSULATION COMPANY, Plaintiff and Respondent, v. HIGHLANDS INSURANCE COMPANY et al., Defendants and Appellants.	B170079 (Los Angeles County Super. Ct. No. BC116835) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 19, 2006, be modified as follows:

On page 56, eighth line, at the end of the first paragraph, following the sentence ending "to settle the action," footnote No. 16 should be added stating: "Louisiana law is in accord. (E.g., *Lafauci v. Jenkins* (La.App. 1 Cir. 2003) 844 So.2d 19, 29; *Rogers v. Government Employees Ins. Co.* (La.App. 3 Cir. 1992) 598 So.2d 670, 672; *Bye v. American Income Life Insurance Company* (La.App. 1975) 316 So.2d 164, 166.)" All subsequent footnotes must be renumbered.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

BOREN, P.J. DOI TODD, J. ASHMANN-GERST, J.

LEXSEE 2006 CAL. LEXIS 4783

FULLER-AUSTIN INSULATION COMPANY, Plaintiff and Respondent, v. HIGHLANDS INSURANCE COMPANY et al., Defendants and Appellants.

S141462

SUPREME COURT OF CALIFORNIA

2006 Cal. LEXIS 4783

April 19, 2006, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division Two, No. B170079. *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th 958, 38 Cal. Rptr. 3d 716, 2006 Cal. App. LEXIS 45 (Cal. App. 2d Dist., 2006)

OPINION:

Petition for review denied & depublication request denied.

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if –

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the

reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall –

(1) inform the debtor –

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of –

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that –

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization –

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking

recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that –

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan –

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan –

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to –

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid

and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –

> **(I)** the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> **(II)** the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> **(III)** the third party's provision of insurance to the debtor or a related party; or
>
> **(IV)** the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –
>
> > **(aa)** involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> >
> > **(bb)** acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means –

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in –

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if –

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable

group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that –

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions. – For purposes of subsection (g) –

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered

before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if –

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims –

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in

default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if –

> **(1)** such creditor retains a security interest in real property that is the principal residence of the debtor;
>
> **(2)** such act is in the ordinary course of business between the creditor and the debtor; and
>
> **(3)** such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

> **(2)** Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases

"Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be –

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements –

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may

come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as –

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following –

(i) by making the statement: "Your first payment in the amount of $___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay

the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy

court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem

the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $___, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $___, leaving $___ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court.

However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ___.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the

terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

H.R. REP. 103-835, 1994 U.S.C.C.A.N. 3340, *3348-49

HOUSE REPORT NO. 103-835

October 4, 1994

[To accompany H.R. 5116]

Section 111. Bankruptcy court injunctions.

This section adds a new subsection (g) to section 524 of the Code, establishing a procedure for dealing in a chapter 11 reorganization proceeding with future personal injury claims against the debtor based on exposure to asbestos-containing products. The procedure involves the establishment of a trust to pay the future claims, coupled with an injunction to prevent future claimants from suing the debtor.

The procedure is modeled on the trust-injunction in the Johns-Manville case, which pioneered the approach a decade ago in response to the flood of asbestos lawsuits it was facing. Asbestos-related disease has a long latency period – up to 30 years or more – and many of the exposures from the 1940's, when asbestos was in widespread use as an insulating material, had become the personal injury lawsuits of the 1970's and 1980's. In 1982, when Johns-Manville filed for bankruptcy, it had been named in 12,500 lawsuits; and epidemiologists estimated that 50,000 to 100,000 more could be expected, with a potential liability totaling $2 billion.

From the beginning, a central element of the case was how to deal with future claimants – those who were not yet before the court, because their disease had not yet manifested itself. The parties in the Manville case devised a creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion

of future profits, along with contributions from Johns-Manville's insurers. Present, as well as future, asbestos personal injury claimants would bring their actions against the trust. In connection with the trust, an injunction would be issued barring new asbestos claims against the emerging debtor company. Asbestos claimants would have a stake in Johns-Manville's successful reorganization, because the company's success would increase both the value of the stock held by the trust and the company profits set aside for it.

The bankruptcy court appointed a special representative for the future claimants; this special representative was centrally involved in formulating the plan and negotiating support for it among the other creditors. The Johns-Manville plan was confirmed and upheld on appeal.[FN8] Nevertheless, lingering uncertainty in the financial community as to whether the injunction can withstand all challenges has apparently made it more difficult for the company to meet its needs for capital and has depressed the value of its stock. This has undermined the "fresh start" objectives of bankruptcy and the goals of the trust arrangement.

Meanwhile, following Johns-Manville's lead, another asbestos manufacturer, UNR, has resolved its chapter 11 reorganization with a similar trust/injunction arrangement. And other asbestos manufacturers are reportedly considering the same approach.

The Committee remains concerned that full consideration be accorded to the interests of future claimants, who, by definition, do not have their own voice. Nevertheless, the Committee also recognizes that the interests of future claimants are ill-served if Johns-Manville and other asbestos companies are forced into liquidation and lose

their ability to generate stock value and profits that can be used to satisfy claims. Thus, the tension present in the trust/injunction mechanism is not unlike the tension present in bankruptcy generally.

The Committee has approved section 111 of the bill in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases. The Committee believes Johns-Manville and UNR were aided in meeting these high standards, in part at least, by the perceived legal uncertainty surrounding this mechanism, which created strong incentives to take exceptional precautions at every stage of the proceeding. The Committee has concluded, therefore, that creating greater certitude regarding the validity of the trust/injunction mechanism must be accompanied by explicit requirements simulating those met in the Manville case.

Seciton 111 requires, in order for present claimants to be bound by a trust/injunction, that the trust have the capability of owning a majority of the shares of the debtor or its parent or of a subsidiary; that the debtor prove that it is likely to be subject to substantial future asbestos claims, the number of which cannot be easily predicted; and that the trust is needed in order to deal equitably with present and future claims; and that a separate creditor class be established for those with present claims, which must vote by a 75 percent margin to approve the plan.

In order for future claimants to be bound by a trust/injunction, section 111 requires that the trust operate in a structure and manner necessary to give reasonable

assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner.

The asbestos trust/injunction mechanism established in the bill is available for use by any asbestos company facing a similarly overwhelming liability. It is written, however, so that Johns-Manville and UNR, both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases.

THIS SOLICITATION IS BEING CONDUCTED TO OBTAIN SUFFICIENT ACCEPTANCES OF A PLAN OF REORGANIZATION *BEFORE* THE FILING OF A VOLUNTARY REORGANIZATION CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE. BECAUSE A CHAPTER 11 CASE HAS NOT YET BEEN COMMENCED, THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED BY THE BANKRUPTCY COURT AS CONTAINING ADEQUATE INFORMATION WITHIN THE MEANING OF SECTION 1125(a) OF THE BANKRUPTCY CODE. FOLLOWING THE COMMENCEMENT OF ITS CHAPTER 11 CASE, FULLER-AUSTIN EXPECTS TO PROMPTLY SEEK AN ORDER OF THE BANKRUPTCY COURT (A) APPROVING THIS DISCLOSURE STATEMENT AS HAVING CONTAINED ADEQUATE INFORMATION AND THE SOLICITATION OF VOTES AS HAVING BEEN IN COMPLIANCE WITH SECTION 1126(b) OF THE BANKRUPTCY CODE; AND (B) CONFIRMING ITS PLAN OF REORGANIZATION.

DISCLOSURE STATEMENT WITH RESPECT TO PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR FULLER-AUSTIN INSULATION COMPANY

DATED JULY 8, 1998

THE VOTING DEADLINE TO ACCEPT OR REJECT THE PLAN OF REORGANIZATION IS 5:00 P.M., EASTERN TIME, ON AUGUST 31, 1998, UNLESS EXTENDED

HOLDERS OF CLAIMS AGAINST FULLER-AUSTIN ARE ENCOURAGED TO READ AND CAREFULLY CONSIDER THE MATTERS DESCRIBED IN THIS DISCLOSURE STATEMENT UNDER "RISK

FACTORS" PRIOR TO VOTING. IN MAKING HIS VOTING DECISION, EACH HOLDER MUST RELY ON HIS OWN EXAMINATION OF FULLER-AUSTIN AND THE TERMS OF THE PLAN OF REORGANIZATION, INCLUDING THE MERITS AND RISKS INVOLVED. EACH HOLDER OF A CLAIM SHOULD CONSULT SUCH HOLDER'S ATTORNEY AND ACCOUNTANT AS TO THE EFFECT OF THE PLAN ON SUCH HOLDER, INCLUDING, BUT NOT LIMITED TO, THE TAX EFFECTS OF THE PLAN.

THIS DISCLOSURE STATEMENT MAY NOT BE RELIED UPON FOR ANY PURPOSE OTHER THAN TO DETERMINE WHETHER TO VOTE IN FAVOR OF OR AGAINST THE PLAN, AND NOTHING CONTAINED HEREIN SHALL CONSTITUTE AN ADMISSION OF ANY FACT OR LIABILITY BY ANY PARTY, OR BE ADMISSIBLE IN ANY PROCEEDING INVOLVING FULLER-AUSTIN OR ANY OTHER PARTY, OR BE DEEMED EVIDENCE OF THE TAX OR OTHER LEGAL CONSEQUENCES OR EFFECTS OF THE REORGANIZATION OF FULLER-AUSTIN. CERTAIN INFORMATION CONTAINED IN THE DISCLOSURE STATEMENT, BY ITS NATURE, IS A FORECAST OF FUTURE EVENTS AND THEREFORE INCLUDES ESTIMATES, ASSUMPTIONS AND PROJECTIONS WHICH MAY PROVE TO BE WRONG, OR WHICH MAY BE MATERIALLY DIFFERENT FROM ACTUAL FUTURE RESULTS.

NO STATEMENT OR INFORMATION CONCERNING FULLER-AUSTIN (PARTICULARLY AS TO FUTURE BUSINESS, RESULTS OF OPERATIONS OR FINANCIAL CONDITION OR WITH RESPECT TO DISTRIBUTIONS TO BE MADE UNDER THE

PLAN) OR ITS ASSETS, PROPERTIES OR BUSINESS THAT IS GIVEN FOR THE PURPOSE OF SOLICITING ACCEPTANCES OF THE PLAN IS AUTHORIZED, OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT. THE STATEMENTS AND INFORMATION ABOUT FULLER-AUSTIN, INCLUDING FINANCIAL INFORMATION, FINANCIAL PROJECTIONS AND INFORMATION REGARDING CLAIMS OR INTERESTS CONTAINED HEREIN, HAVE BEEN PREPARED FROM INFORMATION PROVIDED BY FULLER-AUSTIN, DYNCORP, THE COMMITTEE, THE LEGAL REPRESENTATIVE AND THEIR PROFESSIONALS.

THE STATEMENTS CONTAINED IN THIS DISCLOSURE STATEMENT ARE MADE AS OF THE DATE HEREOF UNLESS OTHERWISE SPECIFIED.

THE TERMS OF THE PLAN GOVERN IN THE EVENT OF ANY INCONSISTENCY WITH THE SUMMARIES IN THIS DISCLOSURE STATEMENT.

* * *

INTRODUCTORY STATEMENT

Fuller-Austin is soliciting acceptances of its chapter 11 plan of reorganization attached as Exhibit A to this Disclosure Statement. This solicitation is being conducted at this time in order to obtain (prior to the commencement of a chapter 11 case) sufficient acceptances to enable the Plan to be confirmed by the Bankruptcy Court pursuant to the provisions of the Bankruptcy Code. Fuller-Austin anticipates that a pre-commencement solicitation will significantly simplify, shorten, and reduce the cost of the administration of its Reorganization Case. Capitalized terms used herein shall have the meanings assigned to

them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, which is attached hereto as Schedule I; such definitions are incorporated herein by reference.

Fuller-Austin is commencing this solicitation after several months of discussions with (a) an informal committee of known, present holders of Asbestos Claims; (b) the Legal Representative for unknown, future holders of Asbestos Claims; (c) the Asbestos Insurance Companies; and (d) DynCorp.

The Plan is the product of negotiations among Fuller-Austin, DynCorp, members of the Committee, the Legal Representative and the Asbestos Insurance Companies. Fuller-Austin and the Committee strongly support the Plan, and Fuller-Austin strongly urges you to vote to accept the Plan. As the letter accompanying this Disclosure Statement indicates, the Committee also recommends that you vote to accept the Plan.

SUMMARY OF VOTING PROCEDURES

Fuller-Austin has sent to all of its known holders of Claims and Interests who are in Classes impaired under the Plan ballots with voting instructions and copies of this Disclosure Statement. Holders of Claims and Interests should read the ballot carefully and follow the voting instructions. Holders of Claims and Interests should only use the official ballot that accompanies this Disclosure Statement.

In order to be counted for voting purposes, ballots for the acceptance or rejection of the Plan must be received by Fuller-Austin's balloting agent Kathleen M. Logan (the "Balloting Agent") no later than 5:00 p.m., Eastern Time, on August 31, 1998, at the following address:

Logan & Company, Inc.
615 Washington Street
Hoboken, N.J. 07030
Telephone: (201) 798-1031

If you are a holder of a Claim or an Interest entitled to vote on the Plan and did not receive a ballot, received a damaged ballot or lost your ballot, you should contact the Balloting Agent. If you have any questions about this Disclosure Statement, the Plan or the procedures for voting on the Plan, you should contact your attorney or Fuller-Austin's attorney, James L. Patton, Jr.

For detailed voting instructions, *see* Section 5.1(b) below, and the instructions accompanying your ballot.

OVERVIEW OF THE PLAN

The following is a brief summary of certain information contained elsewhere in this Disclosure Statement and in the Plan. The summary is necessarily incomplete and is qualified in its entirety by reference to the more detailed information appearing elsewhere in this Disclosure Statement and the exhibits hereto, and the Plan Documents.

The Plan is the product of intensive efforts, over a period of nine months, by Fuller-Austin, DynCorp, the Committee, the Legal Representative and certain of the Asbestos Insurance Companies, to negotiate a plan of

reorganization for Fuller-Austin that is fair and equitable to all parties in interest. Consistent with these objectives, Fuller-Austin believes that considering all of the facts and circumstances underlying the Reorganization Case, the Plan provides for the maximum recoveries to, and the expeditious and equitable treatment of, holders of all Claims, including holders of Asbestos Claims.

The essential elements of the reorganization contemplated by the Plan include, among other things:

(a) the formation of a Trust enjoying the status of a qualified settlement fund, which will assume all liabilities and obligations of Fuller-Austin, among others, in respect of all Asbestos Claims, and which will provide for the equitable distribution of the Trust Assets in partial payment of all Asbestos Claims;

(b) the transfer to the Trust of 100 percent of the common stock of Fuller-Austin;

(c) the funding of the Trust with the Trust Assets;

(d) the payment of Claims in accordance with the requirements of the Bankruptcy Code; and

(e) the issuance of certain injunctions, including, but not limited to, the Discharge Injunction, the Supplemental Injunction, and the Third Party Injunction, as described below, benefitting Fuller-Austin, Reorganized Fuller-Austin and appropriate third parties. The Plan provides for the entry of Injunctions pursuant to sections 524(g) and 105(a) of the Bankruptcy Code as to Asbestos Claims. The Plan contemplates that DynCorp will be protected by the Injunctions

pursuant to sections 524(g) and 105(a) of the Bankruptcy Code; such protections will be afforded to DynCorp, in part, based on its contribution of certain valuable property to Fuller-Austin and the Trust.

The Plan provides for, among other things, a distribution of Cash on the Distribution Date to satisfy in full Allowed Administrative Claims, Allowed Priority Tax Claims, and Allowed Priority Claims, and to satisfy in part Allowed Unsecured Claims.

To address asbestos-related liability issues efficiently and fairly, the Plan provides for the establishment of a Trust, funded as set forth below, for the payment of Allowed Asbestos Claims. Asbestos Claims will be assumed by and transferred to the Trust, and will be liquidated and Allowed or disallowed in accordance with the CRP established pursuant to the Trust Agreement.

With respect to all Asbestos Claims, the goal of the Trust is fair and equitable treatment of all present claimants that have an injury, and all individuals who manifest injuries in the future, (a) from asbestos or asbestos-containing products sold, installed or removed by Fuller-Austin; (b) from services, actions, or operations provided, completed or taken by Fuller-Austin in connection with asbestos or asbestos-containing projects; or (c) for which Fuller-Austin is otherwise liable. The Trust is designed to protect those who are not presently injured but may develop an asbestos-related cancer or other asbestos-related injury in the future by retaining sufficient funds in the Trust to compensate such future Asbestos Claimants to the extent of available Trust Assets.

In addition to promptly resolving Asbestos Claims, it is anticipated that the CRP will reduce expenses significantly, which expenses would otherwise reduce assets available to holders of Asbestos Claims. All holders of Allowed Asbestos Claims will benefit from such cost savings.

The Trust will be funded with the assets to be delivered to the Trust pursuant to the DynCorp Settlement Agreement, the Plan Documents, or otherwise, and include, without limitation, the following assets and any income, profits and proceeds derived therefrom:

- Excess Cash
- $8.5 million in cash
- 100 percent of the common stock of Fuller-Austin
- by operation of law and otherwise by reason of the transfer of 100% of the common stock of Fuller-Austin, all of the Asbestos In-Place Insurance Coverage and the Asbestos Insurance Policies and all rights pursuant thereto
- the proceeds of the Asbestos Insurance Settlement Agreements
- the proceeds of the Asbestos In-Place Insurance Coverage
- the proceeds of the Asbestos Insurance Actions, subject to the terms of the DynCorp Settlement Agreement
- the proceeds of the Asbestos Insurance Action Recoveries, subject to the terms of the DynCorp Settlement Agreement.

Under financial projections (and extrapolations thereof) utilizing certain assumptions with respect to Claims estimation which Fuller-Austin believes are reasonable, and taking into account all potential sources of funding to the Trust, it is anticipated that the Trust will not be able to pay in full all Asbestos Claims as they are liquidated and will not be able to pay all Asbestos Claims in full over time. However, it can be stated with certainty that (a) Fuller-Austin has committed substantial resources for the payment of Asbestos Claims, far exceeding those resources allocated to any other creditor group under the Plan; and (b) the mechanisms of the Trust have been designed to provide reasonable assurance that the Trust will value, and will be in a financial position to pay, similar present and future Asbestos Claims in substantially the same manner. The Trust will be administered by the Trustees pursuant to the CRP. *See* Article 4 hereof for further information regarding the Trust and the CRP.

Fuller-Austin will reorganize its business operations as Reorganized Fuller-Austin. Fuller-Austin is the fee simple owner of certain income-producing real property located in Norco, California and having an appraised fair market value of approximately $1.95 million. Upon Confirmation of the Plan, this property will vest in Reorganized Fuller-Austin, subject to a nine-year lease with DynCorp for a triple net annual rental of $250,000.00.

The Plan permits the business of Reorganized Fuller-Austin to operate free of asbestos-related claims and litigation. The operating business will be protected from asbestos-related claims and litigation by Fuller-Austin's discharge and the Injunctions, which prohibit and enjoin the taking of any legal action against Fuller-Austin, Reorganized Fuller-Austin and others based upon any

claim or demand for injury or death allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.

In addition, the Plan provides for the issuance of the Third Party Injunction to protect certain third parties, including DynCorp, which is providing Fuller-Austin with up to $300,000.00 in funding as described in Section 1.11(a) herein, and any other third parties that provide funding to Fuller-Austin or the Trust for the payment of creditors. The Injunctions are conditions precedent to, and essential elements of, the Plan.

Fuller-Austin believes that the Bankruptcy Court has the equitable jurisdiction and power under sections 105, 524 and 1141 of the Bankruptcy Code, including, but not limited to, section 524(g) of the Bankruptcy Code, to enter the Injunctions.

The distributions to each Class are summarized in the table set forth below, which table is qualified in its entirety by reference to the more detailed and complete descriptions set forth in the Plan and in this Disclosure Statement. In all instances, Fuller-Austin's estimate of the amount of Claims assumes either consensual agreements with the holders of Disputed Claims or favorable determinations as to Disputed Claims.

Summary Description of Classes and Distributions to Holders of Claims and Interests

Unclassified Claims

Description and Estimate of Claims	Description of Distributions or Treatment Under the Plan
Administrative Claims (estimated to be $300,000.00)	Each holder of an Allowed Administrative Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Administrative Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, on the Distribution Date; provided, however, that Allowed Administrative Claims representing (a) postpetition liabilities incurred in the ordinary course of business by Fuller-Austin and (b) postpetition contractual liabilities arising under loans or advances to Fuller-Austin, whether or not incurred in the ordinary course of business, shall be paid by Reorganized Fuller-Austin in accordance with the terms and conditions of the particular transactions relating to such liabilities and any agreements relating thereto.
Priority Tax Claims (estimated to be $0)	Each holder of an Allowed Priority Tax Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Priority Tax Claim, in Cash, in full

satisfaction, settlement, release, extinguishment and discharge of such Claims on the Distribution Date.

Classified Claims and Interests

Description and Estimate of Claims and Interests	**Description of Distributions or Treatment Under the Plan**
Class 1 – Priority Claims (estimated to be $0)	On the Distribution Date, each holder of an Allowed Priority Claim against Fuller-Austin shall receive either (a) the Allowed Amount of its Priority Claim, in Cash or (b) such other, lesser treatment as may be agreed to in writing by such holder and Reorganized Fuller-Austin. This Class is unimpaired.
Class 2 – Secured Claims (estimated to be $0)	Each holder of an Allowed Secured Claim against Fuller-Austin shall retain, unaltered, the legal, equitable and contractual rights (including, but not limited to, any Liens that secure such Allowed Secured Claim) to which such Allowed Secured Claim entitles such holder. This Class is (or these subclasses are) unimpaired.
Class 3 – Unsecured Claims (estimated to be $0)	Except to the extent that a holder of an Allowed Class 3 Claim against Fuller-Austin has agreed to receive other, lesser treatment, on the Distribution

	Date, or as soon as practicable thereafter, each such holder shall receive a distribution from Reorganized Fuller-Austin, in Cash, equal to the Initial Payment Sum Percentage multiplied by the Allowed Amount of its Class 3 Claim. In the event that both (a) the Payment Sum Percentage is increased pursuant to Section 3.1 of the CRP within 10 years of a payment to a holder of an Allowed Class 3 Claim, and (b) the Trustees make supplemental payments to previously paid Asbestos Claimants pursuant to Section 4.3(1) of the CRP, then such Class 3 Claimant shall receive additional distributions from Reorganized Fuller-Austin, in Cash, so that each such Class 3 Claimant shall have received payments, in the aggregate, totaling the amount of the increased Payment Sum Percentage multiplied by the Allowed Amount of such Claimant's Class 3 Claim. This Class is impaired.
Class 4 – Asbestos Claims (estimated to be $286.2 million)	As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be

	addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan (a) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (b) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute, at the Trust's sole discretion, any Direct Action. The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time. This Class is impaired.
Class 5 – Interests in Fuller-Austin	On the Effective Date, the holder of Interests in Fuller-Austin shall retain its Interests for the limited purposes of the implementation of the DynCorp Settlement Agreement; thereafter, on the Effective Date, subject to the terms of the DynCorp Settlement Agreement, the holder shall transfer its Interests to the Trust. This Class is impaired.

FULLER-AUSTIN BELIEVES THAT IT IS IN THE BEST INTERESTS OF ALL PARTIES TO VOTE TO ACCEPT THE PLAN BECAUSE THE PLAN FAIRLY AND EQUITABLY TREATS ALL HOLDERS OF CLAIMS BY PROVIDING THE EARLIEST POSSIBLE AND MAXIMUM RECOVERY TO SUCH HOLDERS. THE COMMITTEE SUPPORTS THE PLAN AND RECOMMENDS THAT HOLDERS OF ASBESTOS CLAIMS VOTE TO ACCEPT THE PLAN.

* * *

ARTICLE 3

SUMMARY OF THE PLAN

* * *

3.2 Satisfaction of Claims and Interests.

(a) *General.* Allowed Claims and Allowed Interests, as classified in Article 2 of the Plan, shall be treated in the manner set forth in Article 3 of the Plan.

(b) *Administrative Claims and Priority Tax Claims.*

(1) *Administrative Claims.* Each holder of an Allowed Administrative Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Administrative Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, on the Distribution Date; provided, however, that Allowed Administrative Claims representing (A) postpetition liabilities incurred in the ordinary course of business by Fuller-Austin and (B) postpetition contractual liabilities arising under loans or advances to Fuller-Austin, whether or not incurred in the ordinary course of business, shall be paid by Reorganized Fuller-Austin in accordance with the terms and conditions of the particular transactions relating to such liabilities and any agreements relating thereto.

(2) *Priority Tax Claims.* Each holder of an Allowed Priority Tax Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Priority Tax Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim on the Distribution Date.

(c) *Fuller-Austin Claims and Interests.* The following constitutes the treatment under the Plan of the Fuller-Austin Allowed Claims and Allowed Interests:

(1) *Class 1 – Priority Claims.* On the Distribution Date, each holder of an Allowed Priority Claim against Fuller-Austin shall receive either (A) the Allowed Amount of its Priority Claim, in Cash, or (B) such other, lesser treatment as may be agreed to in writing by such holder and Reorganized Fuller-Austin.

(2) *Class 2 – Secured Claims.* Each holder of an Allowed Secured Claim against Fuller-Austin shall retain, unaltered, the legal, equitable and contractual rights (including, but not limited to, any Liens that secure such Allowed Secured Claim) to which such Allowed Secured Claim entitles such holder.

(3) *Class 3 – Unsecured Claims.* Except to the extent that a holder of an Allowed Class 3 Claim against Fuller-Austin has agreed to receive other, lesser treatment, on the Distribution Date, or as soon as practicable thereafter, each such holder shall receive a distribution from Reorganized Fuller-Austin, in Cash, equal to the Initial Payment Sum Percentage multiplied by the Allowed Amount of its Class 3 Claim. In the event that both (A) the Payment Sum Percentage is increased pursuant to Section 3.1 of the CRP within 10 years of a payment to a holder of an Allowed Class 3 Claim, and (B) the Trustees make supplemental payments to previously paid Asbestos

Claimants pursuant to Section 4.3(1) of the CRP, then such Class 3 Claimant shall receive additional distributions from Reorganized Fuller-Austin, in Cash, so that each such Class 3 Claimant shall have received payments, in the aggregate, totaling the amount of the increased Payment Sum Percentage multiplied by the Allowed Amount of such Claimant's Class 3 Claim.

(4) *Class 4 – Asbestos Claims.* As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan (A) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (B) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute at the Trust's sole discretion, any Direct Action. The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time.

(5) *Class 5 – Interests.* On the Effective Date, the holder of Interests in Fuller-Austin shall retain its Interests for the limited purposes of the implementation of the DynCorp Settlement Agreement; thereafter, on the Effective Date, subject to the terms of the DynCorp Settlement Agreement, the holder shall transfer its Interests to the Trust.

* * *

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FULLER-AUSTIN INSULATION COMPANY,	)	Case No. 98-2038
Debtor.	)	

PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR FULLER-AUSTIN INSULATION COMPANY

YOUNG CONAWAY STARGATT & TAYLOR, LLP
James L. Patton, Jr. (No. 2202)
Laura Davis Jones (No. 2436)
Joel A. Waite (No 2925)
Matthew G. Zaleski, III (No. 3557)
11th Floor, Rodney Square North
P.O. Box 391
Wilmington, Delaware 19899-0391
(302) 571-6670

Counsel for the Debtor

Dated: June 26, 1998

* * *

ARTICLE 3

TREATMENT OF CLAIMS AND INTERESTS

* * *

3.2 Classes of Claims and Interests.

* * *

(4) *Class 4 – Asbestos Claims.* As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further

act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan, (i) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (ii) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute at the Trust's sole discretion, any Direct Action The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time. This Class is impaired.

* * *

ARTICLE 4

THE TRUST

4.1 *Establishment And Purpose Of Trust.* On the Effective Date, the Trust shall be established in accordance with the Plan Documents. The Trust shall be a "qualified settlement fund" within the meaning of section 468B of the IRC and the regulations issued pursuant thereto. The purpose of the Trust shall be to, among other things, (a) direct the liquidation, resolution, payment, and satisfaction of all Asbestos Claims in accordance with the Plan, the CRP, and the Confirmation Order; (b) preserve, hold, manage, and maximize the Trust Assets for use in paying and satisfying Allowed Asbestos Claims; (c) prosecute, settle, and manage the disposition of the Asbestos In-Place Insurance Coverage; and (d) prosecute, settle, and manage Asbestos Insurance Actions The CRP shall provide

for the allowance and payment or disallowance of Asbestos Claims pursuant to the terms of the Plan Documents.

4.2 *Receipt Of Trust Assets.* On the Effective Date, all Trust Assets shall be transferred to, vested in, and assumed by the Trust, subject to the terms of the DynCorp Settlement Agreement; provided, however, that to the extent that certain Trust Assets, because of their nature or because they will accrue subsequent to the Effective Date, cannot be transferred to, vested in, and assumed by the Trust on the Effective Date, such Trust Assets shall be transferred to, vested in, and assumed by the Trust as soon as practicable after the Effective Date.

4.3 *Discharge Of Liabilities To Holders Of Asbestos Claims.* Except as provided in the Plan Documents and Confirmation Order, the transfer to, vesting in, and assumption by the Trust of the Trust Assets as contemplated by the Plan, among other things, shall (1) discharge the Debtor and Reorganized Fuller-Austin for and in respect of all Asbestos Claims and (2) discharge, release, and extinguish all obligations and liabilities of the Released Non-Debtor Parties and their respective Estates, Affiliates, and subsidiaries, for and in respect of all Asbestos Claims. The Trust shall assume responsibility and liability for all Asbestos Claims and the Trust shall be responsible and liable for all obligations owed by the Trust under the DynCorp Settlement Agreement or the DynCorp Release and such Claims shall be paid by the Trust in full.

4.4 *Excess Trust Assets.* To the extent there are any Trust Assets remaining after the payment, in full, of all Allowed Asbestos Claims and the payment, in full, of all Trust Expenses, such excess Trust Assets shall be transferred, in accordance with Article 7.2(b) of the Trust

Agreement, to such charitable purposes as the Trustees, in their reasonable discretion, shall determine; provided, however, that such charitable purposes, if practicable, shall be related to the treatment of, research regarding or payment of claims related to asbestos-caused disorders.

4.5 *Trust Expenses.* The Trust shall pay all Trust Expenses from the Trust Assets. Neither the Debtor, Reorganized Fuller-Austin, nor DynCorp shall have any obligation to pay any Trust Expenses.

* * *

CLAIMS RESOLUTION PROCEDURES

These Asbestos Claims Resolution Procedures have been adopted in connection with the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company filed in the reorganization case of Fuller-Austin pending in the United States Bankruptcy Court for the District of Delaware and styled *In re Fuller-Austin Insulation Company*. Case No. _____, as such plan may be amended, modified, of supplemented from time to time.

The CRP provide for processing, liquidating, deeming Allowed or not Allowed, paying, and satisfying all Asbestos Claims as provided in and required by the Plan and the Trust Agreement The Trustees shall implement and administer the CRP in accordance with the Trust Agreement. Capitalized terms used herein shall have the meanings assigned to them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, attached as Exhibit 1 to the Plan, and such definitions are incorporated herein

by reference. All capitalized terms not defined herein or in the Glossary, but defined in the Bankruptcy Code or Rules shall have the meanings ascribed to them by the Bankruptcy Code or Rules, and such definitions are incorporated herein by reference.

SECTION I

Purpose and Interpretation

1.1 ***Submission Of All Claims.*** All Asbestos Claims and Demands shall be submitted to the Trust in accordance with the CRP, and the CRP shall constitute the sole and exclusive method by which the holder of an Asbestos Claim or Demand against the Trust, Fuller-Austin. Reorganized Fuller Austin, any Protected Party, any Released Party or any Asbestos Insurance Company may pursue such Asbestos Claim or Demand The Trustees shall not liquidate or pay Asbestos Claims or Demands except in accordance with the CRP. Notwithstanding the foregoing, the Trust may elect to prosecute before the Bankruptcy Court (and all appellate courts) to a Final Order objections to Asbestos Claims filed prior to the Effective Date. Between Confirmation and the Effective Date, prosecution of objections to Asbestos Claims filed-between Confirmation and the Effective Date shall be stayed. Upon allowance of any part of such Asbestos Claim by a Final Order or settlement, the claimant will be paid in accordance with CRP. Additionally, and notwithstanding anything in the CRP to the contrary, the Trust shall pay, or direct Reorganized Fuller-Austin to pay as may be appropriate, to holders of Asbestos Claims the sums required to be paid pursuant to settlements and agreements under Article 5 3 of the Plan without application of the Payment Sum Percentage.

1.2 ***Purpose*** The CRP are adopted pursuant to the Trust Agreement. They are designed to provide prompt determination and payment of Allowed Asbestos Claims and provide reasonable assurance that the Trust will value and be in a financial position to pay similar Asbestos Claims and Demands in substantially the same manner: provided that nothing in the CRP shall apply to a claim for indemnification by an Additional Indemnitee, or by a Released DynCorp Party on account of a Fuller Indemnified Claim, against the Trust, including, without limitation, the processing, determination, allowance, or payment of such claim.

1.3 ***Interpretation.*** Nothing in the CRP shall be deemed to create a substantive right for any claimant. The CRP are procedural and may be amended, deleted, or added to pursuant to the terms of the Plan, the Trust Agreement, the CRP, and the Confirmation Order

1.4 ***General Principles.*** The best information available at the time of the filing of the Reorganization Case indicates that there are not sufficient assets in the Debtor's Estate to pay the full and fair value of all Asbestos Claims. Thus, the formation of the Trust is premised upon the overarching goal of the Reorganization Case – maximizing the value of the amount paid to each holder of an Allowed Asbestos Claim Simultaneously, the Trustees must act in a manner designed to provide substantially the same treatment to each holder of an Asbestos Claim or Demand. In order to aid the Trustees, the following general principles shall guide their decisions and actions.

(a) The Trustees shall favor negotiated or mediated settlement over arbitration or other form of binding alternative dispute resolution, arbitration or other

form of binding alternative dispute resolution over resort to the tort system, and fair and efficient resolution of Claims in all cases, while endeavoring to preserve and enhance the Trust Assets.

(b) The Trustees shall employ mechanisms such as the review of estimates of the numbers and values of Asbestos Claims, or other comparable mechanisms, that provide reasonable assurance the Trust will value, and be in a financial position to pay, present Asbestos Claims and future Demands that involve similar claims in substantially the same manner.

(c) There is inherent uncertainty, regarding Fuller-Austin's total liabilities to holders of Asbestos Claims as well as the total value of the Trust Assets available to pay Allowed Asbestos Claims. Consequently, there is inherent uncertainty as to whether similar amounts can be paid in respect of all similar present and future Allowed Asbestos Claims. Accordingly, subject to the terms of Section II of the CRP, the Trustees have the power to alter the Payment Sum Percentage, the timing, method and sequencing of payments to holders of Allowed Asbestos Claims, the Asbestos-Related Disease Categories and the Criteria, as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category. In order to exercise these powers, the Trustees will need to make determinations and predictions about the amount and timing of the receipt of Trust Assets, as well as determinations and predictions about the amount and timing of payment, and cost of processing. Asbestos Claims. The determination of the Payment Sum Percentage shall be based, on the one hand, upon estimates of the number, types, and amounts of present and expected future Asbestos Claims and, on the other hand,

on the value of the Trust Assets, the liquidity of those assets, the Trust's expected future expenses and income, as well as other material matters that are reasonable and likely to affect the sufficiency of funds to pay a comparable percentage of full value to all holders of Asbestos Claims When making these determinations, the Trustees shall recognize that both present and future claimants bear a risk that the determinations will be incorrect, either too low or too high. In making determinations, the Trustees shall not prefer either present or future claimants by giving either group greater protection from such risks Rather, the Trustees shall make determinations based on their best estimates of total Trust Assets, Asbestos Claims and related matters The Trustees will properly discharge their duties in this regard, and be protected from liability, by making reasonable determinations based on the best information available to them from time to time.

* * *

SECOND AMENDED
CLAIMS RESOLUTION PROCEDURES

These Asbestos Claims Resolution Procedures have been adopted in connection with the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company filed in the reorganization case of Fuller-Austin pending in the United States Bankruptcy Court for the District of Delaware and styled *In re Fuller-Austin Insulation Company,* Case No. 98-2038(JJF), as such plan may be amended, modified, or supplemented from time to time.

The CRP provide for processing, liquidating, deeming Allowed or not Allowed, paying, and satisfying all Asbestos Claims as provided in and required by the Plan and the Trust Agreement. The Trustees shall Implement and administer the CRP in accordance with the Trust Agreement. Capitalized terms used herein shall have the meanings assigned to them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, attached as Exhibit 1 to the Plan, and such definitions are incorporated herein by reference. All capitalized terms not defined herein or in the Glossary, but defined in the Bankruptcy Code or Rules shall have the meanings ascribed to them by the Bankruptcy Code or Rules, and such definitions are incorporated herein by reference.

SECTION I

Purpose and Interpretation

1.1 Submission Of All Claims. All Asbestos Claims and Demands shall be submitted to the Trust in accordance

with the CRP, and the CRP shall constitute the sole and exclusive method by which the holder of an Asbestos Claim or Demand against the Trust, Fuller-Austin, Reorganized Fuller Austin, any Protected Party, any Released Party or any Asbestos Insurance Company may pursue such Asbestos Claim or Demand. The Trustees shall not liquidate or pay Asbestos Claims or Demands except in accordance with the CRP. Notwithstanding the foregoing, the Trust may elect to prosecute before the Bankruptcy Code (and all appellate courts) to a Final Order objections to Asbestos Claims filed prior to the Effective Date. Between Confirmation and the Effective Date, prosecution of objections to Asbestos Claims filed between Confirmation and the Effective Date shall be stayed. Upon allowance of any part of such Asbestos Claim by a Final Order or settlement the claimant will be paid in accordance with CRP. Additionally, and notwithstanding anything in the CRP to the contrary, the Trust shall pay, or direct Reorganized Fuller-Austin to pay as may be appropriate, to holders of Asbestos Claims the sums required to be paid pursuant to settlements and agreements under Article 5.3 of the Plan without application of the Payment Sum Percentage.

1.2 Purpose. The CRP are adopted pursuant to the Trust Agreement. They are designed to provide prompt determination and payment of Allowed Asbestos Claims and provide reasonable assurance that the Trust will value and be in a financial position to pay similar Asbestos Claims and Demands in substantially the same manner; provided that nothing in the CRP shall apply to a claim for indemnification by an Additional Indemnitee, or by a Released DynCorp Party on account of a Fuller Indemnified Claim, against the Trust, including, without limitation, the

processing, determination, allowance, or payment of such claim.

1.3 Interpretation. Nothing in the CRP shall be deemed to create a substantive right for any claimant. The CRP are procedural and may be amended, deleted, or added to pursuant to the terms of the Plan, the Trust Agreement, the CRP, and the Confirmation Order.

1.4 General Principles. The best information available at the time of the filing of the Reorganization Case indicates that there are not sufficient assets in the Debtor's Estate to pay the full and fair value of all Asbestos Claims. Thus, the formation of the Trust is premised upon the overarching goal of the Reorganization Case maximizing the value of the amount paid to each holder of an Allowed Asbestos Claim. Simultaneously, the Trustees must act in a manner designed to provide substantially the same treatment to each holder of an Asbestos Claim or Demand. In order to aid the Trustees, the following general principles shall guide their decisions and actions.

(a) The Trustees shall favor negotiated or mediated settlement over arbitration or other form of binding alternative dispute resolution, arbitration or other form of binding alternative dispute resolution over resort to the tort system, and fair and efficient resolution of Claims in all cases, while endeavoring to preserve and enhance the Trust Assets.

(b) The Trustees shall employ mechanisms such as the review of estimates of the numbers and values of Asbestos Claims, or other comparable mechanisms, that provide reasonable assurance the Trust will value, and be in a financial position to pay, present Asbestos Claims and

future Demands that involve similar claims in substantially the same manner.

(c) There is inherent uncertainty regarding Fuller-Austin's total liabilities to holders of Asbestos Claims as well as the total value of the Trust Assets available to pay Allowed Asbestos Claims. Consequently, there is inherent uncertainty as to whether similar amounts can be paid in respect of all similar present and future Allowed Asbestos Claims. Accordingly, subject to the terms of Section II of the CRP, the Trustees have the power to alter the Payment Sum Percentage, the timing, method, and sequencing of payments to holders of Allowed Asbestos Claims, the Asbestos-Related Disease Categories and the Criteria, as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category. In order to exercise these powers, the Trustees will need to make determinations and predictions about the amount and timing of the receipt of Trust Assets, as well as determinations and predictions about the amount and timing of payment, and cost of processing, Asbestos Claims. The determination of the Payment Sum Percentage shall be based, on the one hand, upon estimates of the number, types, and amounts of present and expected future Asbestos Claims and, on the other hand, on the value of the Trust Assets, the liquidity of those assets, the Trust's expected future expenses and income, as well as other material matters that are reasonable and likely to affect the sufficiency of funds to pay a comparable percentage of full value to all holders of Asbestos Claims. When making these determinations, the Trustees shall recognize that both present and future claimants bear a risk that the determinations will be incorrect, either too low or too high. In making determinations, the Trustees

shall not prefer either present or future claimants by giving either group greater protection from such risks. Rather, the Trustees shall make determinations based on their best estimates of total Trust Assets, Asbestos Claims and related matters. The Trustees will properly discharge their duties in this regard, and be protected from liability, by making reasonable determinations based on the best information available to them from time to time.

(d) All Asbestos Claims are subject to applicable statutes of limitation and to those matters which tolled applicable statutes of limitation under applicable state law at any time prior to the Petition Date. Applicable statutes of limitation with respect to Asbestos Claims are tolled as of the Petition Date and will recommence as to each claimant on the date such claimant is required to file Claims Materials under Section 5.4. If a claimant timely files Claims Materials with the Trust, applicable statutes of limitation as to such claimant's Asbestos Claim shall be tolled from the date of filing of such Claims Materials until one hundred eighty (180) days after notice of the allowance or disallowance of the Asbestos Claim has been mailed or transmitted to the claimant; provided, however, that if a claimant timely seeks review available pursuant to the CRP, applicable statutes of limitation as to such claimant's Asbestos Claim shall be tolled until ninety (90) days after the entry of a non-binding arbitration award.

(e) If, during the evaluation of a Claim by the Trust, the Trust determines that the Claim fails to meet the criteria of the CRP for allowance or that the submitted claim form or supporting materials are deficient, the Trust will provide the claimant with a written deficiency notice. The claimant shall have ninety (90) days from the mailing of the deficiency notice by the Trust to cure the noted

deficiencies by providing the requested information or materials. The claimant may request an extension of sixty (60) days from the end of the 90-day period to cure the deficiency. Such request must be in writing and must be received by the Trust not later than the end of the 60-day period. If the claimant fails to cure the deficiency within such 90-day period or a requested 60-day extension period, the claim automatically will be deemed rejected, without further notice. The Trust may, but will have no obligation to, provide additional deficiency notices with respect to any deficiency, if the claimant attempts to cure the deficiency and the attempted cure is inadequate. After such additional notice, if any, the claimant will have sixty (60) days to respond, with no provision for additional extension.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-JOHN, INC., (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., Debtors	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851

ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

DISCLOSURE STATEMENT
Dated March 14, 1989

PLAN OF REORGANIZATION
Dated March 14, 1989

and

RELATED DOCUMENTS

* * *

PROPOSED
CLAIMS RESOLUTION
PROCEDURES

EXHIBIT F-1

Professor Francis McGovern's Proposed Claims Resolution Procedures

A. Introduction

The best available information from the discovery in the UNR Industries, Inc. ("UNR") bankruptcy proceeding indicates that there will be in excess of 60,000 claims made against the UNR Asbestos Disease Claims Trust ("Trust") Current estimates of the total value of UNR suggest that this case is a traditional bankruptcy; there simply is not sufficient money available to pay full and fair value for each UNR Asbestos Disease Claim. In this respect, the UNR situation is substantially different from the Manville bankruptcy and, therefore, warrants different treatment.

Bankruptcy law requires that the members of each class of claimants be treated equivalently. If there is not sufficient money to pay full value for all of the claims in a class, then all class claimants must be paid the same percentage of full value in accordance with available funds if, for example, there are funds sufficient to pay 25 percent of the total value of all claims, then each claimant should be paid 25 percent of the total value of his respective claim.

The claims covered by these UNR Asbestos Disease Claims Resolution Procedures ("Procedures") are "Asbestos Disease Claims." These claims have been defined in the Consolidated Plan of Reorganization of UNR and its affiliates (the "Plan")[1] – as:

---

[1] Please see the Plan, page two, for the most current definition of Asbestos-Disease Claims

> All alleged liabilities or obligations (under any theory of law, equity or admiralty) for death, personal injury, personal damages or punitive damages (whether physical, emotional or otherwise), whether or not included in the definition of "claim" in § 101(4) of the Code, arising out of exposure to asbestos and arising from acts or omissions, prior to the Effective Date, by one or more of the Debtors or the Debtors' predecessor in interest, regardless of when the sickness, injury or disease which gives rise to such liability or obligation, becomes or will become manifest, including, without limitation, all warranty, guarantee, indemnification or contribution liabilities or obligations of any of the Debtors to any other Entity to the extent that such warranties, guarantees, indemnifications or contribution responsibilities to such Entity cover claims against such Entity that would, if such claims had been made directly against any of the Debtors, constitute Asbestos Disease Claims.

Under the Procedures, each member of the Asbestos Disease Claims class must be treated equivalently in accordance with a series of claims resolution options. Claimants may choose among three different options for the liquidation and settlement of their claims: (1) an expeditious, but limited immediate flat payment, (2) immediate partial payment plus payment over time as money becomes available to the Trust or (3) a deferred claim. All claims will be subject to careful scrutiny to ensure that the only claims paid are valid asbestos injury claims caused by exposure to UNR asbestos-containing products. Values for the claims will be based upon values established in the tort system considering all relevant factors.

One very significant feature of the procedures is that a claimant's right to a jury trial shall be maintained

Payments will be made from the Trust in a first-in-first-out order as explained in the Guidelines set forth hereafter in Section H. The Trustees shall participate and consult with a Trustees' Advisory Committee ("TAC") composed of representatives of claimants in making all major policy and administrative decisions concerning the operation of the Trust and the implementation of these Procedures. A detailed explanation of the operation of some of these Procedures prepared in consultation with the UNR Creditor's Committee of Asbestos-Related Plaintiffs and the Legal Representative for Unknown Asbestos-Related Claimants is available from the Committee.

B. Purpose

The purpose of the Procedures is to provide fair payment to all persons with valid Asbestos Disease Claims for personal injuries resulting from exposure to UNR asbestos-containing products, taking into account the basic principles of the tort system and the resources available to the Trust. It seems clear, based on the information presently available, that there will be insufficient funds available to make full and fair payments to all claimants for the injury and damages from exposure to UNR asbestos-containing products. Consistent with this reality, the nature of asbestos-related disease, and the inherent characteristics of the related litigation, the Trust shall treat similar and common cases with similar circumstances and factors alike. The Trust shall make payments to valid claimants as funds become available and as claims are liquidated while maintaining sufficient resources to

pay all valid Asbestos Disease Claims, including future claims, on a substantially equal basis. Settlements shall be favored over all other forms of claim resolution, and the lowest feasible transaction costs shall be incurred in order to conserve resources and ensure, as much as possible, substantially equal payment for all valid claims The Guidelines in Section H. are intended to provide additional general implementation instructions for the Trustees.

* * *

H. Guidelines

1. *Application*

These guidelines shall apply to all options.

2. *Order of Consideration*

In determining eligibility for consideration, claims will be processed on a first-in-first-out basis in order of the date of the earliest filing of the claim (i) if before July 29, 1982, in a court against UNR; (ii) if after duly 29, 1982, but before the confirmation of the Plan, in a court against any asbestos producer, regardless of whether UNR was named as a party co-defendant in such initial filing, or (iii) if after the confirmation of the Plan, against the Trust. In the event that a claim against UNR as the only defendant could not have been filed because of the UNR Chapter 11 proceeding, the claim shall be processed based upon the date of initial diagnosis of an asbestos-related disease. The Trust may make group settlements, but payments called for by group settlements shall be made so they do not materially alter the first-in-first-out rule of priority. Claims involving extreme and undue hardship not experienced by other

claimants may be considered separately.In the event that the Trustees determine it advisable primarily, but not exclusively, in order to reduce transaction costs, they may suspend their normal order of consideration in favor of claimants who select Option 1.

3. *Payments*

The amount, time, and manner of payments to be made by the Trust shall be determined by the Trustees in accordance with the principles contained in Section B. To the extent feasible, Option 1 payments shall be made in cash by check; Option 2 payments shall be in cash by check and payments over time; and Option 3 payments shall be in cash by check and/or payments over time.

As determined by the Trustees based upon the availability of funds and other considerations, payments made over time shall be paid in a manner designed to ensure that all claims are paid substantially equally. For example, the Trustees may make annual analyses in order to determine the availability of current funds and the future requirements for funds. The Trustees may then utilize available cash to make annual payments of a percentage of all outstanding monies owed over time consistent with the demands of equal treatment of all claimants. In addition, the Trustees may withhold some portion of the amounts awarded for claims under Option 2 or 3 and pay the balance withheld at such time and in such amounts as necessary to enhance equality in distribution and payment among all claimants.

4. *Monitoring*

The Trustees may conduct random or other audits to verify information submitted in connection with any option or step in any option in the claims resolution procedures. To the extent practicable, the Trust shall utilize the panels described in Section H.5 for this purpose in the event that an audit reveals that invalid information has been provided to the Trust, the Trustees may penalize any claimant or claimant's attorney by seeking sanctions from the US. District Court in which the bankruptcy was filed including, but not limited to, requiring the offending source to pay the costs associated with the audit and any future audit or audits, reordering the priority of payment of claims, raising the level of scrutiny of additional information submitted from the same source or sources, or prosecuting the claimant or claimant's attorney for presenting a fraudulent claim in violation of Title 18, U.S.C. § 152.

5. *Pro Bono Plaintiff Attorney and Neutral Panels*

The Trust shall seek to establish panels of *pro bona* plaintiffs' attorneys and/or other neutral persons to provide an appropriate methodology for verification and evaluation of claims. This verification and evaluation shall be conducted by plaintiffs' attorneys and/or neutrals on issues requested by the Trust or the claimants. *Pro bono* plaintiffs' attorney panels may be used only with the consent of the claimant or claimant's attorney and shall be done anonymously so that neither the identification of the claimant, nor the claimant's attorney, nor the *pro bono* evaluator is known to the other. Notwithstanding anything to the contrary, the claimant's attorney and the *pro bono* evaluator may waive the requirement of anonymity.

6. *Alternative Dispute Resolution*

The Trustees shall establish an appropriate alternative dispute resolution process so that the claimants and the Trust shall have a full range of alternative dispute resolution devices available for their use including, but not limited to, mediation, facilitation, and arbitration. Members of the Section H.5 panels may also be used for any form of alternative dispute resolution. If compensation of an alternative dispute resolution provider becomes necessary, each side shall bear its own costs.

7. *Forms and Procedures*

The Trustees shall draft appropriate forms and instructions for all Asbestos Disease Claims under Options 1-3. All forms shall indicate that they are submitted to the Trust with a declaration of their accuracy under penalty for presentation of a fraudulent claim in accordance with Title 18, U.S.C. § 152. The Trustees shall develop and implement procedures and processes under each option in accordance with the principles outlined in Section B.

8. *Release*

As a condition to making any payment to a claimant, the Trust shall obtain a general or partial or limited release as appropriate in accordance with the applicable state or other law and consistent with the Option selection by the claimant. If allowed by state law, the endorsing of a check or draft for payment by or on behalf of a claimant shall constitute such a release.

9. *Time Frames*

Time frames for the performance of the various duties of the Trust shall be determined by the Trustees consistent with the purpose of these Procedures as contained in Section B.

10. *Alternative Claim Resolution Options*

The Trustees may, based upon new circumstances or developments, design alternative options to these Procedures as long as they are consistent with the purposes contained in Section B.

11. *Trustees' Advisory Committee*

There shall be a Trustees' Advisory Committee ("TAC") composed of five persons jointly selected by the UNR Creditors' Committee of Asbestos-Related Plaintiffs and the Legal Representative for Putative Asbestos-Related Claimants. The Trustees shall consult with the TAC on all critical issues facing the Trust including, but not limited to, implementation of procedures under Options 1, 2, and 3; development of FIFO-rules; payments; monitoring; attorney and neutral panels; ADR; forms and procedures; releases; time frames, cooperation with other claims resolution organization; and alternative options under these procedures.

EXHIBIT F-2

Plaintiffs' Committee's and Legal Representative's Proposed Trust Agreement and Annexes Thereto

This Trust Agreement is among UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-Rohn, Inc.

(Alabama), UNR-Rohn, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc. and Folding Carrier Corp (sometimes referred to collectively as "Debtors"), as Settlers, and ___, the Trustees pursuant to the ___ Amended and Restated Consolidated Plan of Reorganization of the Debtors dated ___, 1989 (the "Plan").

WHEREAS, the Debtors are seeking to reorganize under the provisions of Chapter 11 of the United States Bankruptcy Code (the "Code"); and

WHEREAS, the Debtors have filed the Plan, which provides, among other things, for the discharge of any liability the Debtors may have for debts to persons holding Asbestos-Disease Claims; and

WHEREAS, the Plan contemplates the creation of a trust, the assets of which will be used to resolve and satisfy all Asbestos-Disease Claims asserted against the Debtors.

NOW, THEREFORE, it is hereby agreed as follows:

Article I

DEFINITIONS

Unless the context requires otherwise, all capitalized terms used herein and not otherwise defined shall have the meanings assigned to them by the Plan and/or the Code, which are incorporated by reference herein.

Article II

AGREEMENT OF TRUST

2.01 *Creation and Name.* There is hereby created a trust, which shall be known as the "UNR Asbestos-Disease Claims Trust" (the "Trust").

2.02 *Purpose.* The purpose of the Trust is to assume any and all liabilities of the Debtors, their successors in interest or their affiliates with respect to persons holding *bona fide* Asbestos-Disease Claims by fully, fairly and expeditiously compensating such claimants pursuant to the provisions of the Trust and the UNR Asbestos-Disease Claims Resolution Procedures ("Procedures"). In furtherance of this purpose, the Trustees shall be responsible for supervising and administering the claims resolution process set forth in the Procedures, a copy of which is appended hereto as Annex B.

2.03 *Transfer of Assets.* There is hereby transferred and assigned to the Trust 29,437,004 shares of the common stock of New UNR (the "Shares"), and $1,000,000 in cash, representing a loan to the Trust from New UNR secured by the Shares and the proceeds of which shall be utilized to begin immediate implementation of the Procedures

2.04 *Acceptance of Assets and Assumption of Liabilities.* In connection with and in furtherance of the purposes of the Trust, and subject to Section 5.04, the Trustees hereby expressly accept the transfer and assignment to the Trust of the assets described in Section 2.03, and the Trust hereby further expressly assumes, undertakes and shall control the liquidation of all Asbestos-Disease Claims. Notwithstanding the foregoing, the Trust shall not have any obligation with respect to any warranty,

guarantee, contribution or indemnification liability constituting an Asbestos-Disease Claim unless the same has been liquidated prior to the consummation date. Moreover, the Trustees shall not pay any such liquidated warranty, guarantee, contribution or indemnification claim unless and until the aggregate liability of the Trust in respect of the Asbestos-Disease Claim underlying such liability or obligation, whether directly or through contribution, also has been liquidated. Holders of such liquidated warranty, guarantee, contribution or indemnification claim shall receive payment in an amount to be determined by the Trustees to be substantially equal in proportion to that received by holders of Asbestos-Disease Claims. Neither the Debtors nor New UNR shall be entitled to any indemnification from the Trust for any expenses, costs and fees (including attorneys' fees), judgment, settlements, or other liabilities arising from or incurred in connection with, any action related to an Asbestos-Disease Claim.

Article III

POWERS, TRUST ADMINISTRATION

3.01 *Powers* (a) Subject to the limitations set forth in this Trust Agreement, the Trustees shall have the power to take any and all such actions as in the judgment of the Trustees are necessary or convenient to effectuate the purposes of the Trust, including, without limitation, each power expressly granted in Subsection 3.01(c), any power reasonably incidental thereto, and any trust power now or hereafter permitted under the law of the State of Illinois (including the Illinois Trust and Trustees Act) that is not inconsistent with the provisions of this Trust.

(b) Except as provided in the Plan or otherwise specified herein, the Trustees need not obtain the order of approval of any court in the exercise of any power or discretion conferred hereunder, or account to any court in the absence of a breach of trust.

(c) Without limiting the generality of Subsection 3.01(a), above, the Trustees shall have the power to:

(i) receive and hold the Trust estate, and invest in cash, bonds, stocks, securities, certificates of deposit, and other cash equivalents from time to time therein, subject to the limitations set forth in Section 4.02;

(ii) supervise and administer the Procedures;

(iii) pay liabilities and expenses of the Asbestos-Disease Claims in accordance with the Procedures as applicable, or as otherwise allowed;

(iv) borrow money and issue notes and Other evidence of indebtedness (which notes or other evidence of indebtedness may exonerate the Trustees from personal liability with respect thereto) in the ordinary course of operations for payment of *bona fide* Asbestos-Disease Claims and other expenses and liabilities of the Trust;

(v) exercise all rights and benefits accruing to the Trust as owner of the Shares;

(vi) establish such funds, reserves and accounts within the Trust estate, as deemed by the Trustees to be useful in carrying out the purposes of the Trust;

(vii) sue and be sued and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, including, without limitation, in connection with the Procedures;

(viii) amend the Bylaws;

(ix) appoint such officers and hire such employees and engage such legal, financial, accounting, investment and other advisors, custodians of assets, alternative dispute resolution panelists, and agents as the business of the Trust requires, and to delegate to such persons such powers, authorities and discretions as the Trustees, in their discretion, deem advisable or necessary in order to carry out the terms of this Trust;

(x) pay the Trustees, subject to Section 5.05, and pay such officers, employees, legal, financial, accounting, investment and other advisors, agents and alternative dispute resolution panelists reasonable compensation;

(xi) reimburse the Trustees, subject to Section 5 05, and reimburse such officers, employees, legal, financial, accounting, investment and other advisors, agents, alternative dispute resolution panelists and members of the Trustees' Advisory Committee ("TAC") for all properly documented out-of-pocket costs and expenses incurred by such persons in connection with the performance of their duties hereunder;

(xii) enter into such other arrangements with third parties as are deemed by the Trustees to be useful in carrying out the purposes of the Trust,

(possibly including, without limitation, engaging a Person having trust powers to act as paying agent, depository, custodian, or trustee with respect to funds, reserves or accounts created hereby or established pursuant hereto);

(xiii) in accordance with Section 5.06, indemnify (and purchase insurance indemnifying) Trustees and officers, employees, agents and representatives of the Trust to the fullest extent that a corporation organized under Illinois law is from time to time entitled to indemnify its directors, officers, employees, agents and representatives;

(xiv) indemnify (and purchase insurance indemnifying) the Additional Indemnitees as defined in Section 5.06 hereof;

(xv) enter into any contract or otherwise engage in any transaction with any Trustee or any Person affiliated with any Trustee, provided that such contract or such transaction is approved by the unanimous vote of the Trustees, it being understood that, to the extent permitted by law, the usual rules prohibiting fiduciaries from dealing with themselves as individuals or from dealing with respect to any matter in which they have a personal interest shall not apply to the Trustees;

(xvi) delegate any or all of the discretionary power and authority herein conferred at any time with respect to all or any portion of the Trust estate to any one or more reputable individuals or recognized institutional advisers or investment managers without liability for any action taken or omission

made because of any such delegation except as provided in Section 5.04;

(xvii) consult with New UNR at such times and with respect to such issues relating to the conduct of the Trust as the Trustees consider desirable; and

(xviii) merge with any other claims resolution facility if the Trustees shall determine by unanimous vote, after consultation with and the consent of the TAC, that the purposes and substantive procedures of such other claims resolution facility are consistent with the Procedures, which determination by the Trustees shall be final, binding and non-appealable.

(d) The Trustees shall not have the power to guarantee any debt of other Persons.

* * *